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Can Justice Be Anything Other than Human?

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Abstract. Artificial intelligence (AI) is an emerging technology in the field of justice, which, though only used in limited fashion, is likely to bring potentially disruptive changes in the future. This study examines some of the most significant characteristics of AI that make it suited, and at the same time unsuited, to application during litigation. Specifically, the problems of opacity in decision making by machine learning algorithms and the lack of a way to project flexible human morality on such systems is emphasized. The author concludes that AI will be a useful tool for preparation of litigation; however, it is less likely to replace the human judge, as adjudication presupposes understanding of human sentiment and the sense of justice, which requires some degree of bias in a positive sense.

Keywords: artificial intelligence, human factor, litigation, judge, machine learning

One of the most significant suggestions made by those seeking to predict the future is that artificial intelligence (AI) will be employed in the judiciary, resulting in the replacement of some legal professions – as seems preferable by some, mainly of lawyers – perhaps even of judges. One of the main proponents of such views is Richard Susskind, who in his writings[1] (*The End of Lawyers?* or *Tomorrow's Lawyers: An Introduction to Your Future*) explores the potential effects of artificial intelligence on legal professions.

This direction of development and its possible impact on legal services can already be seen in Romania.[2] The former president of the National Union of Romanian Bar Associations made a particularly pessimistic statement[3] about the

1 For a relevant review and critique, see Madocsai 2014.
2 Macovei 2018.
3 Florea 2017.

risks posed to the judiciary by artificial intelligence. Reflections projecting an increasingly gloomy future in this field also concern the legal community as to whether it is possible to replace the human factor (human judge) with a machine in resolving litigation.

Like so many other issues related to artificial intelligence, this seems to be a philosophical concern that deviates from reality, but in fact it explores the technological possibilities of overcoming an often quite serious problem: the lack of impartiality or judicial bias. Just as the general public has hoped for fairer decisions in football since the introduction of video refereeing (and instead the rigidity of referees' calls has increased),[4] the technological replacement of judges (as Richard Susskind argues) can be hoped to lead to cheap, fast, incorruptible, and above all impartial justice (but may in effect lead to something entirely different).

Such utopian ponderings raise two significant issues: 1. AI employed in the judiciary will not be able to use the tools of human cognition to resolve the dispute but will instead utilize opaque IT algorithms; 2. 'mathematical' justice measured out with a pharmacist's scale constituted by an algorithm in the name of so-called complete impartiality can lead to serious injustices that are incompatible with both the human sense of right and wrong and a sense of legality in individual cases.

1. The most efficient implementation of artificial intelligence now known is the so-called machine learning, including deep learning[5] algorithms. However, AI is not the same as the concept of machine learning[6] but a much broader notion. While 'intelligence' also refers to the meaning of flexible, creative machine-based problem solving, which is commonly referred to as *general* artificial intelligence (GAI) – to which science is not much closer than it was 50 years ago – machine learning is limited to an algorithm that has a large but finite number of steps, which, by performing a repetitive operation very quickly, is able to discover certain correlations in a given mass of data. This produces apparently 'intelligent' answers to narrowly defined questions such as the identity of the contents of two photographs.

The larger the amount of data machine learning is based on and the more examples available to it from the data being queried, the more precisely the algorithm 'learns' to delineate the elements of the data mass desired to be filtered out or separated from others. In order for machine learning algorithms to work as intended, the program must therefore be 'taught' first, and the essential criteria for selection must be introduced, which it must then recognize in the data subsequently provided to it during operation. The operation of machine learning

4 Spitz–Moors–Wagemans–Helsen 2018.
5 Hof 2013.
6 Marr 2016.

is similar to first graders' learning during calligraphy exercises: the teacher draws the letter to be learned on the blackboard, and then the elementary school pupil tries to imitate it to the best of his/her abilities, copying the given character repeatedly one after the other until s/he learns to draw it with sufficient certainty.

For this reason, through machine learning, a machine that is said to be artificially intelligent can only learn to recognize a pattern over time, once it has been previously 'taught' with many examples considered demonstrably correct for the given pattern by a human operator. The recognition of the pattern is practised by the machine in such a way that the correct results it has achieved are followed by some manner of positive feedback from its human operator who reviews the results' correctness in the course of operation or subsequently. This feedback may also be achieved automatically, based on human-defined criteria during operation. Such an algorithm can, for example, select histological samples containing detectable tumours,[7] based on images of the given samples, with an accuracy well beyond that of a radiologist provided that sufficient examples (photographs) of the phenomenon to be identified are provided during the training phase. Exactly how this identification works during the running of the algorithm is better understood for some algorithms and less obvious to programmers[8] in the case of others, depending on the technology used, a phenomenon known as 'opacity'. From this stem the two main obstacles to the application of algorithms commonly referred to as artificial intelligence to the field of justice.

On the one hand, the concept of justice has not been satisfactorily defined by mankind. John Rawls, perhaps the most prominent philosopher on the subject, for example, has identified[9] several different theories of fair behaviour that serve social cooperation. The aim of the judiciary is precisely to preserve this social cooperation (the so-called social contract). At present, there is no way to give a machine sufficient examples of what is generally accepted as a socially just solution to a dispute so that, if it recognizes the defining characteristics of that dispute, it would be able to resolve it on its own with a comparable degree of justice. Indeed, it is not only individuals who value and apply the concept of justice in a heterogeneous way but also the legal norms themselves. Is it fair, for example, for a thief who steals food for his/her starving children to face the same punishment as a well-heeled kleptomaniac? Obviously not. A computer trained on random judgments in cases of theft may not be able to detect this difference.

Machine learning algorithms always try to demarcate certain elements from the dataset they are trained with, on the basis of criteria that are considered self-explanatory to them (although not obvious to others) and based on some machine-identified common characteristics.

7 Hu–Tang–Wang–Zhang–Zhang–Sun 2018. 134–149.
8 Smith 2018.
9 Rawls 1994.

As many aspects of human life can now be digitized, it is conceivable that all known information about a person (genetics, health, financial and educational information, parents' and siblings' identity, political views, banking details, written and oral recordings, criminal history, etc.) may be collected and collated into a single database and would then serve to fully describe the person. From such a dataset, the computer can be taught to identify, for example, the common behavioural characteristics of individuals convicted of certain crimes or suffering from certain illnesses. Later, the machine will be able to tell whether or not given persons are prone to commit a certain crime or contract a certain disease, based solely on the person's 'digital footprint'. To render justice though – by the method of machine learning known today – a computer would need to reach deeper insights, which it cannot yet do. What it can do is to proceed to a form of social profiling: by use of a given (typically statistical) method, it can determine the likelihood that a person is prone to certain behaviours or may have even exhibited such behaviours in the past. However, this finding cannot itself lead to a 'just' judgment, only to one based on a new form of prejudice, a problem characteristic of the human factor (the judge), but the very one which we would want to eliminate in the first place through the use of computers in the administration of justice. This operation of machine learning algorithms will have a good chance of being put to practical use for the first time in today's totalitarian societies.

On the other hand, the 'cognitive processes', the internal reasoning of the machine cannot always be made explicit in order to learn the truth about what factors it took into consideration and which ones it chose to ignore when rendering a decision. IT professionals are not always able to determine why certain machine learning algorithms produce a particular result, even if the result is from the intended operation of the algorithm. This is called the problem of 'opacity' or accountability of algorithms[10] in machine decision making. If we cannot determine exactly why an algorithm has made a particular decision (or perhaps we can only determine that it did so because it found the solution as being *most likely* for the given case), we cannot verify the fairness of the decision. This problem[11] already exists[12] although it still seems[13] significant to only a few particular situations. In law, however, accountability as well as legal and factual justification for decision making are essential. Only based on the statement of reasons given by the court can we determine if a judgment is fair and legal. Only based on the reasons can the possibility of administrative and judicial remedies be ensured to the affected person who sought justice against an illegal, unfair, or unjust decision.

10 World Wide Web Foundation 2017.
11 Diakopoulos–Friedler 2016.
12 Diakopoulos 2015.
13 Kemper–Kolkman 2019.

2. Law in the broadest sense can by no means be simplified into mathematical, logical processes because the application of law is much more human-bound and subjective than what would permit algorithms to replace the human factor. Law is a creation of the state that conveys dominant values and political goals. Imagine what would have happened if in the cases regarding the restitution of the Batthyaneum Library (in Alba Iulia, Romania) or the Székely Mikó College of the Reformed Church (in Sfântu Gheorghe, Romania) these were resolved by an AI entity, based on a serious and objective consideration of the facts, and this entity would have rendered a decision for restitution, having previously ascertained that these immovables – over which property rights disputes endured – constituted the property of the Catholic Church or of the Reformed Church, and not that of the Romanian state.

Do we dare to imagine that the application of the law would be ceded by any state, taken as a community of national interest, to an AI entity, which could then act with complete and utter impartiality? Or could we accept the alternative that a national consciousness or a nationalist pattern of behaviour may emerge in the AI entity either by inadvertent 'pollution' of the data pool used to teach it or as a result of deliberate programming choices? As society becomes more complex, the need for legal regulation is ever-growing. This may lead to norms regulating AI to either generate or avoid any of these outcomes…

A perhaps less menacing but equally significant possibility is the potentially revolutionary effect AI may have on legal research and documentation, which is still not without its perils and difficulties. For example, the advent of constructs similar to the information bubbles already extant in the case of social media platforms is not at all inconceivable and would carry inherent risks to the fairness of judicial procedures. Artificial intelligence and IT in general play an increasingly important role in the service of law enforcement, and this role will continue to expand. Artificial intelligence itself is one of the most difficult new areas of norm development, as its operation and spread is inconceivable without precise legal regulation.

The perils of artificial intelligence must be contained by legal preventive measures. Without the right legal framework, according to the experts themselves who are at the forefront of its development,[14] the use of some AI tools seems to be becoming an increasingly dangerous gamble.

The reality is that the true expectation of the state from any system instituted for the application of the law is that it remains – to a certain extent – subjective, and that which is subjective is either prone to – or indeed driven by – human prejudice. This has both negative and positive aspects. If we are to perform more complex legal tasks with AI, then these typically human emotions and prejudices must at first be mastered by the AI entities employed in order for such

14 Vincent 2018.

tendencies to be brought under their 'rational' control so as to be then considered in the service of a fairer way of rendering justice. Such a process is possible: AI develops and improves by processing huge amounts of data. When data tainted with prejudice is fed in to create an artificially intelligent process, the process shall inherit[15] the prejudice reflected in the data. However, by teaching AI entities to detect and ignore such prejudice, or in the service of justice (compatible with the human sentiment of fairness) consider other elements of the case than 'just the facts', a better system of rendering justice may truly be achieved.

Obviously, it should not be ruled out, and it should even be considered reasonable, that simple legal work can be automated, and this will lead to a certain reduction in the number of lawyers. Yet, opinions predicting the disappearance of the legal professions are unfounded. There is no need to worry about the legal professions, even as the role of AI grows and the use of IT tools becomes more and more intensive in law enforcement. The 'human factor' may only be introduced into law enforcement by projecting that human factor onto whatever solution for rendering justice exists (i.e. AI cannot entirely substitute but may effectively assist the human lawyer or judge). Let us consider without undue emotion the following: would we entrust the application of criminal law to algorithms, for example? Or can we imagine an AI entity applying Islamic religious law, using Sharia norms, as it objectively approves the institution of a fixed-term marriage (or that of a marriage contract with a minor) designed to circumvent the prohibition of prostitution?

The emergence of artificial intelligence will not eliminate conflicts in society. No technology can have such an effect – the existence of conflicts is a necessary corollary of human society. If we look to the future, we should rather fear the growth of new areas where this conflict may arise.

Imagine a dispute in which the lawyers of the parties on both sides use the help of AI. Conflict and competition between artificial intelligences may then also be an emerging new issue. One of the positions, however, must ultimately prevail, otherwise the dispute will remain unresolved. When applying the law, the (human) judge considers the partial truths existing on both sides, and absolutizes one of the partial truths in order to resolve the dispute. This is why legal and moral truths can differ in many cases. The question persists if AI is able to do the same.

Can a third artificial intelligence decide the conflict between two artificial intelligences? There is a significant difference between AI entities meant to project human abilities and a human who calls upon the help of an AI entity. Artificial intelligence will play an important role in many legal processes. For example, it can significantly reduce transaction costs for contracting. However, in the case of litigation, its role is likely to be applied mostly to preparatory and advisory tasks.

15 Zou–Schiebinger 2018.

The general danger of artificial intelligence in the long run is human dementia. Excessive use of AI might endanger legal culture and knowledge and the necessary and appropriate level of human conflict resolution. AI can only be fully exploited by a lawyer who is in control of it and highly trained in his/her own right.

'Releasing' innovation, and law as the value-based management and development system of human society, which pioneered moral processes from the hands of humanity, is truly a gamble.

References

DIAKOPOULOS, N. 2015. Algorithmic Accountability. Journalistic Investigation of Computational Power Structures. *Digital Journalism* 3. https://www.tandfonline.com/doi/abs/10.1080/21670811.2014.976411?journalCode=rdij20 (accessed on: 10.01.2020).

DIAKOPOULOS, N.–FRIEDLER, S. 2016. How to Hold Algorithms Accountable. *AIT Technology Review* 17.11.2016. https://www.technologyreview.com/s/602933/how-to-hold-algorithms-accountable/ (accessed on: 10.01.2020).

FLOREA, G. 2017. Inteligența artificială s-ar putea întoarce împotriva umanității! *Juridice.ro* 16.11.2017. https://juridice.ro/essentials/1828/gheorghe-florea-inteligenta-artificiala-s-ar-putea-intoarce-impotriva-umanitatii (accessed on: 10.01.2020).

HOF, R. D. 2013. Deep Learning. *AIT Technology Review* 23.04.2013. https://www.technologyreview.com/s/513696/deep-learning/ (accessed on: 10.01.2020).

HU, Z.–TANG, J.–WANG, Z.–ZHANG, K.–ZHANG, L.–SUN, Q. 2018. Deep Learning for Image-Based Cancer Detection and Diagnosis – A Survey. *Pattern Recognition* November 2018. https://doi.org/10.1016/j.patcog.2018.05.014 (accessed on: 10.01.2020).

KEMPER, J.–KOLKMAN, D. 2019. Transparent to Whom? No Algorithmic Accountability without a Critical Audience. *Information, Communication & Society* 2019. https://www.tandfonline.com/doi/full/10.1080/1369118X.2018.1477967 (accessed on: 10.01.2020).

MACOVEI, M. 2018. Înlocuieşte inteligența artificială juristul? *Juridice.ro* 26.08.2018. https://www.juridice.ro/598482/inlocuieste-inteligenta-artificiala-juristul.html (accessed on: 10.01.2020).

MARR, B. 2016. What Is the Difference Between Artificial Intelligence and Machine Learning? *Forbes* 12.06.2016. https://www.forbes.com/sites/bernardmarr/2016/12/06/what-is-the-difference-between-artificial-intelligence-and-machine-learning/ (accessed on: 10.01.2020).

RAWLS, J. 1994. *The Main Idea of the Theory of Justice*. https://www.csus.edu/indiv/c/chalmersk/econ184sp09/johnrawls.pdf (accessed on: 10.01.2020).

SMITH, A. 2018. Franken-Algorithms: The Deadly Consequences of Unpredictable Code. *The Guardian* 29.08.2018. https://www.theguardian.com/technology/2018/aug/29/coding-algorithms-frankenalgos-program-danger (accessed on: 10.01.2020).

SPITZ, J.–MOORS, P.–WAGEMANS, J.–HELSEN, W. F. 2018. The Impact of Video Speed on the Decision-Making Process of Sports Officials. *Cognitive Research: Principles and Implications* 3. https://doi.org/10.1186/s41235-018-0105-8 (accessed on: 10.01.2020).

SUSSKIND, R. 2016. Artificial Intelligence and the Law Conference at Vanderbilt Law School. *YouTube* 06.05.2016. https://www.youtube.com/watch?v=xs0iQSyBoDE (accessed on: 10.01.2020).

VINCENT, J. 2018. Elon Musk, DeepMind Founders, and Others Sign Pledge to Not Develop Lethal AI Weapon Systems. *The Verge* 18.07.2018. https://www.theverge.com/2018/7/18/17582570/ai-weapons-pledge-elon-musk-deepmind-founders-future-of-life-institute (accessed on: 10.01.2020).

WORLD WIDE WEB FOUNDATION. 2017. *Algorithmic Accountability. Applying the Concept to Different Country Contexts*. https://webfoundation.org/docs/2017/07/WF_Algorithms.pdf (accessed on: 10.01.2020).

ZOU, J.–SCHIEBINGER, L. 2018. AI Can Be Sexist and Racist – It's Time to Make It Fair. *Nature* 18.07.2018. https://www.nature.com/articles/d41586-018-05707-8 (accessed on: 10.01.2020).

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Artificial Intelligence, Justice, and Certain Aspects of Right to a Fair Trial[1]

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Abstract. The study constitutes a synthesis of available knowledge on the worldwide implementation of artificial intelligence (AI) in the judicial process. The authors' objective is to present this information in a structured way and thereby assess the likelihood and potential risks of AI-assisted and AI-based adjudication. The real-life implementation of AI as a supporting tool for human adjudicators, as a means of aiding the drafting of judicial decisions, and as a machine adjudicator are presented and analysed. The authors then contrast available information on AI adjudication with these forms of AI participation in order to discover whether the basic guarantees of a fair trial could be ensured by AI. They examine AI's potential effects on the public legitimacy of the courts, on access to justice, on the duration of the judicial process, on the publicity of the trials, on the factors considered while investigating evidence, on potential situations of discrimination or bias, and on the (im)possibility of obtaining reasoned rulings from AI entities, permitting the subjection of their decisions to judicial remedies. The authors conclude that AI is likely to remain just an aid for the human judge in the foreseeable future.

Keywords: artificial intelligence, software, judge, trial, reasoning, civil procedure, criminal procedure

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1. Introduction

A rapidly evolving strand of the legal literature has focused on the implementation of artificial intelligence into the different fields of legal work. Amongst these concepts, the perspectives offered to the judiciary have always been highlighted.[2] At the first phase of this discussion, several authors argued for robot judges, who might be more rational and impartial than their human counterparts.[3] Nevertheless, other experts called for the careful assessment of the expected impacts, and currently more weight is given to the preservation of existing procedural safeguards than to the expected increase of efficiency.[4]

We will draw the conclusion that AI in the courtroom itself is a worthy idea; however, the introduction of decision-making algorithms should not take place until sufficiently extensive experience has been gained from AI participation in the judiciary. We may increase our knowledge from this phenomenon with the help of two methods.

On the one hand, those national examples should be examined in depth where AI has been involved in the judicial work. Most of these models come from places outside Europe, from legal systems where rule of law standards are less stringent or more flexibly interpreted. Mainstream literature has often relied on a series of AI-based judicial software examples already functioning in different jurisdictions;[5] however, these mechanisms have not been analysed in depth, at least with the intent of completeness.

A meticulous multi-level timeline is to be elaborated to implement AI into judicial work while highlighting prudential considerations. Those areas of judicial activity should be identified where AI involvement has a lower chance to undermine the current standard of fundamental rights protection, and a five-year-long first transitory period is proposed to using AI in these selected fields on a voluntary basis, depending on the will of the parties. With the help of this practical application, if experiences point in the right direction, a second transitory period may begin after a period of five years, when a more extensive but still prudent application of AI should be allowed.

2 From the latest literature, see as an example: Reiling 2020. 1–8.
3 See Nakad et al. 2015. 59–67; Yilmaz 2019. 67–102.
4 See Székely 2019. 231–244; Siboe 2020; Volokh 2019. 1135–1192.
5 Selected relevant sources will be cited below.

2. Real-Life Examples of Applying Artificial Intelligence in Justice Systems

We take the view that at the current level of scientific and technological development AI in the judiciary may be classified into three main categories based on their exact functions and roles played in the court. AI may consist in various *supporting software* for certain tasks of court work; it may be allowed to *submit concrete proposals* for the content of judicial decisions; and it may serve in the court as a *decision-maker*, fully independent from human intervention. The first two options are deemed to be widespread within the foreseeable future, so we will focus on these two categories during the outline of our proposal for a standard. Nevertheless, the already existing attempts to achieve an independent decision-maker AI will be also enumerated and assessed.

2.1. AI as a Supporting Software for Parts of Typical Court Work

A comprehensive knowledge of the relevant legislation, case law examples, and legal literature is essential for the court to base its adjudication activity on due reasoning. As a result, any judicial decision is preceded by lengthy and meticulous legal research. AI-based legal research software is designed to speed up this process. By entering all the relevant data, the program sums up the issue in a research result. Overseas, one, if not the most common, legal research tool is *LexisNexis*. Its database comprises more than 83 billion pieces of legislation and case law, 40,000 legal articles, and 700 million business registration data.[6] Among other similarly widespread applications, we can refer to *Westlaw*[7] or *Any Law*,[8] but these are all applications developed and operated by commercial companies and not courts or other state organizations. As a prominent example, the Supreme Court of India has advanced and deployed its own legal research operating system, SUPACE (Supreme Court Portal for Assistance in Courts Efficiency).[9]

In the further enhanced version of the legal research toolkit, we can account for a solution named *Alexsei*. The program provides responses to legal questions in a ready-to-use memorandum format relying on AI searching for all relevant information through the Internet. The memo consists of the research question,

6 https://www.lexisnexis.com/en-us/products/lexis.page.

7 https://legal.thomsonreuters.com/en/products/westlaw-a?abcd=b&cid=9005579&sfdccampaignid=7011B000001xaeFQAQ&chl=na&adobe_mc_sdid=SDID%3D26D8151462EDEB46-453868D00CF2F4D3%7CMCORGID%3DA7D63BC75245AE300A490D4D%40AdobeOrg%7CTS%3D1618770150&adobe_mc_ref=https%3A%2F%2Fabovethelaw.com%2F.

8 https://blog.anylaw.com/2020/06/10/new-machine-learning-technology-by-anylaw-disrupts-20b-legal-research-industry/.

9 Snehanshu 2021.

the program's conclusions, the legal background, and the key authorities in the given field.[10]

As another approach of supporting the judiciary's work, an AI-based application called *Prometea* creates judicial documents other than judgments for human judges at the Inter-American Court of Human Rights.[11]

The Chinese Internet Courts foster ways of introducing AI to help human judges in their work without substituting them completely. The Hangzhou Internet Court has deployed an intelligent evidence analysis system adopting blockchain, artificial intelligence, big-data, and cloud computing technologies. It analyses and compares all the evidence submitted by the parties, transforming it into a list of evidence and corresponding exhibits. After sorting and classifying the relevant information, it visually presents the evidence for the human judge's consideration.[12]

2.2. Submitting Proposals for Judicial Decisions

In the next subcategory, we can list examples in which the AI system independently assesses the question requiring a judicial decision and then submits a proposal containing its possible answers. The position put forward: 1. may later be approved by the court, and a decision with the same content may be rendered, and even become final; 2. may be altered by the human judge if he/she disagrees with certain parts based on his/her own convictions or resulting from his/her own research procedure; 3. may be rejected in its entirety, and a judgment based on exclusively human adjudication may be rendered. The proposal resulting from the automated process does not necessarily cover all aspects of the case but is suitable for resolving the dispute. This type of AI-based judicial software is demonstrated through various examples.

In some member states of the United States of America (for example: New York, Wisconsin, California, and Florida), the courts in criminal matters apply an AI-based system called COMPAS (Correctional Offender Management Profiling for Alternative Sanctions). This tool is available for data calculations performed in order to determine the recidivism risk of perpetrators. COMPAS's conclusions are formed by the following set of data: previous and pending accusations, criminal record, residence, employment status, community relations, and drug consumption habits. After comparing all these factors, it evaluates the chances of the perpetrator's relapse on a scale of 1 to 10, on which the court can later base its decision on the possible release.[13]

10 https://www.alexsei.com/solution/#structure.
11 Prometea 2020.
12 Xuan 2021.
13 http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-Core-_031915.pdf.

The second example arises from Malaysia. The Malaysian courts can choose to use AI to propose the level of imprisonment imposed on the accused person for any crime related to drug possession or rape. We could not find a proper explanation for the reasons why AI is being used specifically in these two subcategories of crimes. When recommending a conclusion, the AI derives it from information such as the age, occupation, and other circumstances of the perpetrator, determined on a case-by-case assessment, if deemed relevant.[14]

In Mexico, courts can apply AI to give advice on determining whether someone is entitled to a form of social security or not. The program named *Expertius* grounds its calculations on information about past claims, results of the claims, hearing records, and final judgments.[15]

The Colombian justice system also seeks solutions for easing the human judge's workload. At the Colombian Constitutional Court, an AI system called *PretorIA* is being developed to help in guardianship selection procedures. *PretorIA* does not replace humans with this task but facilitates its completion by making a first analysis of the guardianship sentences to deliver more processed information to those who are in charge of identifying persons who need to be selected. At this moment, *PretorIA* is in the testing phase, undergoing final adjustments.[16] We can find similar products in Columbia's neighbouring country, Brazil. In the State of Minas Gerais, an application called *Radar* reads the claims submitted to the court, identifying repetitive arguments, and deduces the applicable law from that information. Furthermore, based on its previous legal research, it develops a suggestion for resolving the case at hand, which can be amended or implemented by court officers.[17]

2.3. AI as an Independent Decision-Maker

As the previous subchapter has shown, some examples will be provided, where AI fully takes over the adjudicative role of the judiciary. In this case, human involvement is excluded from the proceeding and can only have an effect as an appeal forum on the specific request of the parties.

Perhaps the most popular example of AI-led digital courts can be found in China: the first Internet Court was set up in 2017 in the city of Hangzhou,[18] followed by two more in Beijing and Guangzhou.[19] The judicial proceedings can be initiated by anyone on any issue related to digitization (e.g. consumer

14 Hafizah 2020.
15 Goretty 2012. 827–846.
16 https://ialab.com.ar/pretoria/.
17 Matt 2020.
18 https://www.netcourt.gov.cn/.
19 *What's the Magic of the Internet Justice China Program Cyberspace Administration of China?* 2019.

protection complaints, online copyright disputes, electronic payment).[20] The whole procedure takes place in the online space, the parties can participate in the hearing by video call, and they can also upload their evidence online in encrypted form using blockchain technology. The 'person' of the judge is an artificial intelligence entity, which – based on all data available – resolves the dispute using machine learning methods.[21]

Opinions have recently been disclosed[22] stating that the Internet Court is in fact operated by human judges and that AI performs only administrative functions. However, the reality has not been officially disclosed, and it is in fact rather difficult to ascertain in the case of China. According to the Cyberspace Administration of China, in Beijing, AI is only assisting in case handling instead of deciding on the merits.[23] Other sources report that humans oversee AI's procedure and rule exclusively in difficult cases[24] or that they only intervene when an emergency occurs.[25] In any case, AI would be able to engage in adjudication, so there is a real possibility that it is indeed being applied in China at this moment as well.[26]

A slightly different model emerging from Brazil is also worth contemplating. A court project called *VICTOR*[27] aims at classifying the legal complaints of the Brazilian Supreme Court with the help of a pattern recognition mechanism. In Brazil, the Supreme Court applies a separate admissibility test to adjudicate on the received applications. The court must take into account the importance of the case for the economic, political, and social aspects to determine the *general repercussion* the decision of the highest judicial forum may have, before it proceeds to trial.[28] A party's claim will only be considered on its merits if it is deemed appropriate in the admissibility test; otherwise it ends up rejected. The *VICTOR* system performs this test without human intervention.[29] Although the full content of a given case is not judged by the *VICTOR* system, an independent decision on the admissibility may prove to be a useful shortcut preceding the review of the case's merits, so we believe that, in view of the consequences, AI can be considered as a decision-maker in this case too, and through this channel it will exercise a significant impact on access to justice.

20 Zhu 2019.
21 *AI Judges, Verdicts via Chat App: Brave New World of China's Digital Courts.* 2019.
22 Soltau 2020.
23 Kong 2021.
24 Duca 2020.
25 *What's the Magic of the Internet Justice China Program Cyberspace Administration of China?* 2019.
26 https://www.youtube.com/watch?v=KQZxwbkm0sg.
27 Brazilian Federal Supreme Court 2018.
28 Maina 2008.
29 Nilton et al. 2018. 7–11.

As already mentioned above, in Argentina, the Public Prosecutor's Office of the City of Buenos Aires has set up a software called *Prometea* in order to automate judicial proceedings. Apart from automating document drafting, *Prometea* may be used for creating court rulings as well. The software operates as a chatbot whom users can talk to, specifying their legal problem on housing reaching the court level. It asks for the case number and then matches it with its underlying legal problems. In order to find the appropriate one, *Prometea* covers over 300,000 examples on the Internet. In the case of appeals, it searches through the case documents, including the judgments of lower-instance courts. Afterwards, it extracts the patterns of previous judgments and contrasts them with the legal opinions already signed by the Public Prosecutor's Office.[30]

The idea of algorithmic decision-making gained a foothold in Europe also: Estonia plans to introduce AI in property law cases not exceeding €7,000.[31] Other Estonian initiatives aim at replacing human judges with AI in automated expedited payment order procedures.[32] These projects are still in their preparatory phases but are well placed to draw attention to the possibility of evaluating and considering these solutions by other countries as well.

3. AI in the Courtroom and the Different Aspects of Right to Fair Trial

After having provided our methodology, as well as the technical background and practical experience behind our argumentation, now we turn to the main part of our research and will ground our findings concerning the impact of AI on the different aspects of right to fair trial.

3.1. Legitimacy of Courts

The respect and due execution of court rulings are based on the reliance upon the judiciary, wherefore the legitimacy of judges should stand beyond doubt, or at least should be deemed to stand beyond doubt.[33]

On the one hand, social trust may be served by the involvement of AI especially in plain cases, where AI might be able to decide faster and more accurately than a human judge ever could, and this might increase the efficiency of the judicial system.[34]

30 Elsa–Sebastián–Pablo 2020.
31 Rabbitte 2019.
32 Jan-Matthias 2019.
33 Michelman 2019. 1059–1063.
34 de Saint-Laurent 2018. 738–739.

Moreover, the delegation of certain tasks to AI in the judiciary might help with minimizing the distortive effects of external factors such as the current mental and physical circumstances of the judge or his or her precautions.[35]

On the other hand, as a first counterargument, numerous authors raised serious concerns primarily due to the obvious differences between human thinking and machine reasoning. The understandability, comprehensibility, and interpretability of robots are requirements that emanate from the inherently human surrounding and logic, where AI should deliver its contributions.[36] If the outcome or the path of logic through which the AI draws its inferences are not accessible or traceable for humans, this will generate severe distrust in AI judges or judicial assistants.[37]

Secondly, the alleged higher level of impartiality potentially provided by AI has also been questioned. AI does not rely on potentially flawed human considerations but may be manipulated or even managed by its software developers or the data provided to it. Consequently, according to this line of argumentation, although the prevention of certain human mistakes would be generally welcomed, the mere statistical analysis grounded on selected data should not lead to potentially illegitimate outcomes.[38]

Thirdly, according to the traditional concept, a trustworthy judge is supposed to spend long years during legal education and also obtain considerable practical experience with the necessary legal skills and social knowledge before his or her judicial appointment.[39] The reliance on courts is mostly explained by the assumption that judges are highly qualified and morally untainted, but, at the very least within the current circumstances, this is just as doubtful for human judges as it is for the developers of AI.

In the light of the above considerations, one may argue that despite the tangible and undeniable advantages the currently achievable level of potential legitimacy for AI is far from the requirements set for human judges,[40] wherefore AI may be currently involved only in legal research or in the judgement of plain or low-value cases under strict human control – at least at the first stage of implementation.

3.2. Access to Justice

AI would serve easier access to justice with the reduction of external barriers, which mean at the moment the limits of judicial capacity. The effectiveness of AI would not be diminished by the too severe burden of work, and an AI would be

35 Buocz 2018. 41–59.
36 Hildebrant 2017.
37 Ződi 2018. 253, 256.
38 Barroso 2020. 339–340.
39 Sourdin 2015.
40 Sourdin 2015. 1123–1124.

able to work in the place of several judges at the same time, so all activities of the judiciary would be remarkably faster.[41]

A further foreseeable advantage would be the money saved for the state budget and for the individuals involved in litigation.[42] Fewer judges would be able to fulfil the judicial tasks under the same timeframe, wherefore more attention would be paid to each case, and the number of the judicial staff might be decreased. From another perspective, it would be significantly easier technically to address the courts, while postal expenses would largely disappear.

Apart from these benefits, AI would assess the admissibility of cases, where mostly formal grounds should be checked. Human judges would deal at least with the more complex cases of admissibility, but most of such issues would be treated by AI. This would reduce the workload of courts while promising faster decisions on admissibility for the parties.[43]

Nevertheless, in spite of these obvious benefits, AI in courts would increase social inequalities from an access-to-justice perspective. Marginalized social groups, who may completely or partially lack the necessary knowledge, technical infrastructure, and information, may have additional difficulties in approaching the courts or taking part in judicial proceedings.[44] So, the presence of robot judges would support well-situated people but would establish just additional difficulties for groups whose interests are already underrepresented in the decision-making process.

Thus, caution is advised even in the field of access to justice; during the first period, AI should appear only as an option under rigorous human control, and the explicit consent of all parties should be necessary to involve AI at any stage of the proceeding, even as a supporting tool of the judicial assessment.

3.3. Duration of Cases

The duration of cases is that aspect of right to fair trial where the positive impact of artificial intelligence stands beyond all doubt. These new technologies could save money, time, and effort for courts, and thus the prolonging of a high number of cases might be prevented.[45]

AI would not be faced with such difficulties as human judges: the traditional bounds of working hours are not relevant for AI, while tiredness or lack of sleep would not be factors either. AI might be able to research the case law and prepare reports for the human judges from the previous relevant court rulings in seconds.

41 Rabinovich-Einy–Katsh 2017. 655–657.
42 http://plaw.nlu.edu.ua/article/view/201782.
43 Rabinovich-Einy–Katsh 2017. 655–657.
44 Salter 2017. 114–115.
45 Dymitruk 2019. 37–38.

The useful case law might be identified considerably faster, and AI may find which arguments might be invoked in the particular legal controversy from the pre-selected case law.

One may argue that AI as a judge or judicial assistant may contribute to deliver more cases within a shorter timeframe, at least with a level of precision comparable to that of human judges. So, from a purely case duration perspective, AI in the courts seems a fruitful idea, but its interdependence with aspects related to the right to fair trial should also be taken into account, which may lead to a more complex overall picture. To propose an example, evidence may be assessed by AI more efficiently but potentially less accurately with the neglect of particular factors, which might be obvious for a human being but completely alien to the algorithmic logic based on statistical analysis.

3.4. Publicity of Trials

Publicity is a crucial safeguard of judicial proceedings, which must prevail in all aspects of the process: during the trial, concerning documents, and also the content and the reasoning of the judgement.

AI may support the publicity of trials, since owing to modern technologies it might be significantly easier just to register and join the trial online than devote our time to the journey and also the physical exertions presupposed by our presence in the courtroom.[46]

However, according to our assessment, at least three main concerns may be relevant here.

Firstly, as partly conceptualized earlier and to be also detailed later, the reasoning of an AI-made judgement might not be – to use the technical term – human-readable.[47]

Secondly, parties may not have access to the documents of the procedure due to the lack of comprehensibility and the rapidity of AI decision-making. When the litigant could first request the revealing of any data created during the proceeding, it would be probably already too late, as the AI would make its decisions before giving a reasonable chance to submit such requests.[48] It is often hard to reconstruct the content and the functioning of AI software even for the developers after their activation as a consequence of the *black-box effect*, so the data produced during the proceeding may not be available and may not be archivable.[49]

Thirdly, several companies developing AI as well as public agencies may qualify the modus of decision-making itself as secret, based on its proprietary

46 Michael–Matthew–Suzor 2017. 422–423.
47 Kelemen 2019. 1336–1344.
48 Huq et al. 2017. 1–10.
49 Jootaek 2020.

character or on national security grounds, which may also undermine accountability. Transparency rules must be implemented to avoid these unwanted consequences, especially for those private stakeholders who provide technical facilities for exercising public power.[50] In the case of a non-deterministic artificial intelligence system, certification has to be carried out continually, and continuous human monitoring for certified artificial intelligence systems has to be solved independently,[51] i.e. not by self-assessment of legal-tech companies but by independent officials employed by judicial institutions.

It is argued by some scholars that such a high level of transparency and detailed reasoning is being required from AI that would not even be requested of human beings,[52] but it is also noteworthy that human judges should always provide a detailed reasoning of their judgement, and the standard for AI judges should also be set by the exigences of the right to fair trial and not those of traditional human ways of decision-making.

From a publicity perspective, the involvement of AI may be attractive. There are two main fears that should be addressed: lack of transparency should be avoided with the adoption of proper safeguards, and a system should be elaborated to secure access for judicial documents and also for their sustainable and safe long-term archiving.

3.5. Investigation and Assessment of Evidence

There are several ways to rely on AI during the assessment of evidence. AI may interact as an impartial expert and could give an opinion, which would be taken into consideration just as a scientific argument, and for the sake of rationality.[53] Moreover, AI could provide new perspectives to the assessment of evidence, especially in criminal investigations, with the help of modern technology.[54]

One could argue that in the case of an AI expert the impartiality of the opinion would be unquestionable[55] and that the AI should not be influenced by its previous social experience, good or bad impressions from certain individuals or groups of individuals or should not overgeneralize isolated inputs.[56]

By contrast, lots of relevant and reasonable considerations may disappear from the assessment of evidence since the logic of AI may operate with an inherently different approach than its human counterparts.[57] A human judge should rely on

50 Warren 2015. 227–232.
51 CEPEJ 2020. 6–7.
52 Reuben 2018. 1–11.
53 Walton 2020. 369–401.
54 Petit 2017.
55 Bench-Capon–Modgil 2017. 29–64.
56 Raso et al. 2018.
57 Martins 2020.

social reality, should consider whether the behaviour or the alleged behaviour of a person was expectable from a person with average mental capacity and prudence, etc.[58] Apart from this, a human judge may put the evidence into its social context, which may also add valuable points to the complete and balanced overview of all conflicting interests.[59] The AI cannot recognize cases caused by systematic deficiencies or discrepancies and could solve just certain specific issues; and it would also be unable to deal with controversies with new factual or legal elements (the overfitting problem).[60]

Besides this, a human judge may exercise clemency when an otherwise attributable behaviour may be explained by the exact circumstances or the benevolent or justifiable intents of the person concerned.[61] This kind of flexibility could not be reasonably expected from an AI entity. The 'long tail problem' is described in the relevant literature to outline this situation: AI is not able to reflect on unforeseeable situations and on challenges that may not be classified clearly with statistical methods or on the grounds of previous memories of the AI.[62]

In our view, the delivery of expert opinions is the only field of the judicial investigative process where AI may have an active role to play during the first stage of implementation. More experience and knowledge and further technical development would be necessary to use a trustworthy AI in preparing an overall assessment of evidence.

3.6. Non-Discrimination

AI may certainly eliminate some humanly constructed irrational precautions from the judicial proceeding,[63] but these alleged impacts are often outweighed by strong counterarguments.[64] In spite of the seemingly neutral and rational character of AI, it may be used easily even intentionally or just accidentally in a way resulting in discriminatory judicial practices.[65]

On the one hand, marginalized social groups, such as ethnic and racial minorities or people with disabilities, have usually worse criminal histories than other subgroups in society, wherefore they could easily be considered by AI judges as less reliable or to be at a major risk of committing further crimes after their release (recidivism).[66] An AI software usually does not provide race

58 Fabian 2020.
59 Rosin–Lampos 2018.
60 Verheij 2017.
61 Roth 2016.
62 Pastukhova–Lievens 2017.
63 Borgesius 2020. 1575–1578.
64 Risse 2018.
65 Rodrigues 2020.
66 Packin–Aretz 2018. 103–106.

or ethnicity as an 'explicit' factor for its decision (and may even be barred from doing so by technical means), but the system of criteria considered may itself be formulated in such a way that it will be significantly more unfavourable for persons from disadvantaged social backgrounds than for well-situated persons. The already mentioned COMPAS system has been developed in the USA to calculate the length of proposed imprisonment by considering a combination of several factors to gain a real profile from the criminal record of the person concerned. A convicted person lodged a judicial application against this system, but American courts upheld its constitutionality by stating that it mostly operates with factors relevant from the perspective of the criminal record, so it is supposed to be racially neutral. Nevertheless, certain investigations found that despite the overtly race-neutral character of the system, its real impact is seriously discriminatory for the black community.[67]

Another discrimination-related concern is the collection of training data: AI could rely exclusively on data provided to it before or during the proceeding. Consequently, the outputs provided by the AI may be easily manipulated, and a distorted set of training data would lead the AI to ill-founded conclusions.[68]

AI in the courtroom would have probably an ambiguous effect on discrimination in the judicial process. This is again an argument for our prudential approach. At the moment, we find it too risky to expect from an AI to calculate the length of imprisonment. In the first stage of implementation, AI may be used for determining the degree of less severe sanctions, for instance, the amount of the penalty imposed or of lower-value damages. This may give us some further impetus to analyse more in depth how AI could be a really impactful tool of a racially and ethnically neutral judiciary and how to exclude any possibility of a biased decision-making.

3.7. Reasoning of the Rulings

The involvement of AI would influence not only the main steps of the judicial proceeding itself but also the form and content of the judgement.[69] We have mentioned that AI at its current level of human comprehension is not necessarily able to provide reasons for its decisions in some cases. In the situation of AI involvement in the rendering of justice, social trust should be maintained, wherefore a human-readable reasoning in the broadest possible sense should be provided by any AI involved in judicial activities. We find the lack of this component problematic at least under three respects.

67 Larson–Mattu–Kirchner–Angwin 2016.
68 https://www.relativity.com/data-solutions/ediscovery/.
69 Morison Harkens 2019.

A key element of the aforementioned social trust in courts is the presumption that the judgement of the court is the result of a fair, balanced, and circumspect process.[70] Interesting considerations may be found in the case law of the European Court of Human Rights (ECtHR) on the assessment of jury systems from the perspective of lack of detailed reasoning, which has clear correlations with the level of social trust in these institutions.[71]

Reasoning is an integral part of a complete judgement, and it also plays an important role in maintaining legal certainty: interested stakeholders may examine past argumentations of the courts to preview the expected outcome of their particular legal controversy.[72] Without substantive reasoning, foreseeability and clarity of norms would be merely terms without real content, which would relativize the right to a fair trial and, more broadly, the rule of law itself.

In addition, human judges use several and different methods of interpretation (textual, contextual, comparative, teleological, precedent-based, moral, etc.) when qualifying a case: they have to create the most convincing and a well-based reasoning determined by all the circumstances of the case. Considering AI technologies, it is questionable whether the interpretative choices could be easily coded.

Requests for remedies are usually grounded on the alleged mistakes of the court's reasoning: the mere outcome of the logical process is not sufficient to become familiarized with the in-depth approach of the court and to decide whether the underlying argumentation provided behind the decision should be acceptable for the parties. In the process of judicial remedies, the initiator of the given remedy must outline the detailed factual and legal grounds of his/her appeal. This requirement cannot be fulfilled if the considerations of the first instance court do not stand at the disposal of the appellant.[73]

The potential of AI to be able to conduct effective bilateral communication with human beings and to provide a detailed reasoning should be an essential precondition of the substantial judicial involvement of these entities. Until this level of technical development is achieved, AI will not be an independent decision-maker[74] and will remain just a supporting tool, always subject to human review.

70 Lori 2019.
71 The case of Taxquet v Belgium, European Court of Human Rights, application no. 926/05. 13 January 2009.
72 Scherer 2016. 364.
73 Edwards–Veale 2017. 18–84.
74 Ulenaers 2020. 37–38.

4. Conclusions

On the grounds of the above considerations, at this stage we cannot consider robot judges or a justice app on smart phones likely for some time to come. In the field of the judiciary, legislation shall closely follow legal-tech developments, and – considering rule of law and implicitly fair trial requirements – it shall create legislative frameworks and guarantees.[75]

Our most important finding is that AI may usefully support legal research and reaching the judgment in low-value, similar, minor, and mass cases (e.g. contractual disputes over online shopping, services, and financial loans) while still remaining under human control. AI should be involved as a supporting tool, interacting with the first instance human court, and the parties should explicitly give their consent to the application of such techniques. Human dignity requires the possibility of choice and of self-determination when parties enter into a judicial dispute resolution. Special guarantees are necessary in criminal justice to observe human dignity when applying AI systems.

References

BARROSO, L. R. 2020. Technological Revolution, Democratic Recession, and Climate Change: The Limits of Law in a Changing World. International. *Journal of Constitutional Law* 18. https://doi.org/10.1093/icon/moaa030 (accessed on: 24.11.2021).

BENCH-CAPON, T.–MODGIL, S. 2017. Norms and Value-Based Reasoning: Justifying Compliance and Violation. *Artificial Intelligence and Law* 26.

BINNS, R. 2018. Fairness in Machine Learning: Lessons from Political Philosophy. *Proceedings of Machine Learning Research* 81. http://proceedings.mlr.press/v81/binns18a/binns18a.pdf (accessed on: 24.11.2021).

BORGESIUS, F. 2020. Strengthening Legal Protection against Discrimination by Algorithms and Artificial Intelligence. *The International Journal of Human Rights* 2020. https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1743976 (accessed on: 24.11.2021).

BRAZILIAN FEDERAL SUPREME COURT. 2018. Inteligência artificial vai agilizar a tramitação de processos no STF [Artificial Intelligence Will Streamline the Processing of Cases at the Supreme Court]. *Jusbrasil* 2018. https://stf.jusbrasil.com.br/noticias/584499448/inteligencia-artificial-vai-agilizar-a-tramitacao-de-processos-no-stf (accessed on: 24.11.2021).

BUOCZ, T. J. 2018. Artificial Intelligence in Court. Legitimacy Problems of AI Assistance in the Judiciary. *Spring* 2.

75 De Gregorio 2021.

COUNCIL OF EUROPE'S EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE [CEPEJ]. 2020. *Possible Introduction of a Mechanism for Certifying Artificial Intelligence Tools and Services in the Sphere of Justice and the Judiciary: Feasibility Study, as Adopted at the 34th Plenary Meeting of the CEPEJ, 8 December 2020*. https://rm.coe.int/feasability-study-en-cepej-2020-15/1680a0adf4 (accessed on: 24.11.2021).

DE GREGORIO, G. 2021. The Rise of Digital Constitutionalism in the European Union. *International Journal of Constitutional Law* 19. https://doi.org/10.1093/icon/moab001 (accessed on: 24.11.2021).

DE SAINT-LAURENT, C. 2018. In Defence of Machine Learning: Debunking the Myths of Artificial Intelligence. *Europe's Journal of Psychology* 14. http://dx.doi.org/10.5964/ejop.v14i4.1823 (accessed on: 24.11.2021).

DUCA, B. 2020. Robot Judges and the Chinese Legal Cyberspace. *Relawding* 2020. https://www.relawding.com/robot-judges-and-the-chinese-legal-cyberspace/ (accessed on: 24.11.2021).

DYMITRUK, M. 2019. The Right to a Fair Trial in Automated Civil Proceedings. *Masaryk University Journal of Law and Technology* 13. https://doi.org/10.5817/MUJLT2019-1-2 (accessed on: 24.11.2021).

EDWARDS, L.–VEALE, M. 2017. Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You Are Looking For. *Duke Law & Technology Review* 16. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972855 (accessed on: 24.11.2021).

ELSA, H.–SEBASTIÁN, L. L.–PABLO, F. F. 2020. Prometea Transformando la administración de justicia con herramientas de inteligencia artificial [Transforming the Justice Administration with Tools of Artificial Intelligence]. *IDB* 2020. https://publications.iadb.org/publications/spanish/document/PROMETEA-Transformando-la-administracion-de-justicia-con-herramientas-de-inteligencia-artificial.pdf (accessed on: 24.11.2021).

FABIAN, S. 2020. Artificial Intelligence and the Law: Will Judges Run on Punch Cards. *Common Law Review* 16.

GORETTY, C. M. B. 2012. La inteligencia artificial y su aplicación al campo del Derecho [The Artificial Intelligence and Its Application in the Field of Law]. *Alegatos* 82.

GUIHOT, M.–MATTHEW, A. F.–SUZOR, N. P. 2017. Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence. *Vanderbilt Journal of Entertainment & Technology Law* 20.

HAFIZAH, A. H. 2020. Mahkamah, Sabah dan Sarawak bakal guna aplikasi AI dalam sistem perundangan [Sabah and Sarawak Courts Will Use AI Applications in the Legal System]. *Utusan Borneo* 17.01.2020. https://www.utusanborneo.com.my/2020/01/17/mahkamah-sabah-dan-sarawak-bakal-guna-aplikasi-ai-dalam-sistem-perundangan (accessed on: 24.11.2021).

HILDEBRANT, M. 2017. Law as Computation in the Era of Artificial Intelligence. Speaking Law to the Power of Statistics. *SSRN* 10. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983045 (accessed on: 24.11.2021).

HUQ, A. Z. et al. 2017. Algorithmic Decision Making and the Cost of Fairness. In: *Kdd'17: Proceedings of the 23rd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining*. https://arxiv.org/pdf/1701.08230.pdf (accessed on: 24.11.2021).

JAN-MATTHIAS, M. 2019. Kohtunikud saavad robotabilised: riik otsib võimalusi kohtusüsteemis tehisintellekti rakendamiseks [Judges Are Becoming Robotic Assistants: The State Is Looking for Ways to Apply Artificial Intelligence in the Judiciary]. *Forte* 2019. https://forte.delfi.ee/artikkel/85777829/kohtunikud-saavad-robotabilised-riik-otsib-voimalusi-kohtususteemis-tehisintellekti-rakendamiseks (accessed on: 24.11.2021).

JOOTAEK, L. 2020. Artificial Intelligence and Human Rights: Four Realms of Discussion, Research, and Annotated Bibliography. *Rutgers International Law & Human Rights Journal* 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3625848 (accessed on: 24.11.2021).

KELEMEN, K. 2019. Constitutional Reasoning: A Flourishing Field of Research in Comparative Law. *International Journal of Constitutional Law* 17.

KONG, X. 2021. *Artificial Intelligence in Judicial Practice*. http://www.cac.gov.cn/2019-08/08/c_1124851874.htm (accessed on: 24.11.2021).

LARSON, J.–MATTU, S.–KIRCHNER, L.–ANGWIN, J. 2016. How We Analyzed the COMPAS Recidivism Algorithm. *Propublica* 2016. https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm (accessed on: 24.11.2021).

LORI, G. 2019. L'intelligence artificielle s'invite auprès de la justice. *Euronews* 28.01.2019. https://fr.euronews.com/my-europe/2019/01/28/l-intelligence-artificielle-s-invite-aupres-de-la-justice (accessed on: 24.11.2021).

MAINA, N. S. 2008. Brazil: The Supreme Federal Tribunal and the 'General Repercussion' Requirement. *Mondaq* 2008. https://www.mondaq.com/brazil/constitutional-administrative-law/57864/the-supreme-federal-tribunal-and-the-general-repercussion-requirement (accessed on: 24.11.2021).

MARTINS, J. M. 2020. A System of Communication Rules for Justifying and Explaining Beliefs about Facts in Civil Trials. *Artificial Intelligence and Law* 25.

MATT, B. 2020. AI, Machine Learning & Big Data. Brazil. *Global Legal Insights* 2020. https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-laws-and-regulations/brazil (accessed on: 24.11.2021).

MICHELMAN, F. I. 2019. Legitimacy and Moral Support. *International Journal of Constitutional Law* 17. https://doi.org/10.1093/icon/moz091 (accessed on: 24.11.2021).

MORISON, J.–HARKENS, A. 2019. Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making. *Legal Studies*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369530 (accessed on: 24.11.2021).

NAKAD, H. et al. 2015. *The Rise of the Robotic Judge in Modern Court Proceedings*. https://www.researchgate.net/publication/300720949_The_Rise_of_the_Robotic_Judge_in_Modern_Court_Proceedings (accessed on: 24.11.2021).

NILTON, C. S. et al. 2018. Document Type Classification for Brazil's Supreme Court Using a Convolutional Neural Network. *The Tenth International Conference on Forensic Computer Science and Cyber Law*. https://www.researchgate.net/publication/328582117_Document_type_classification_for_Brazil's_supreme_court_using_a_Convolutional_Neural_Network (accessed on: 24.11.2021).

PACKIN, N. G.–ARETZ, L. Y. 2018. Learning Algorithms and Discrimination. In: *Research Handbook of Artificial Intelligence and Law*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168579 (accessed on: 24.11.2021).

PASTUKHOVA, A.–LIEVENS E. 2017. *Artificial Intelligence as a Judge: Can We Rely on a Machine?* https://libstore.ugent.be/fulltxt/RUG01/002/376/194/RUG01-002376194_2017_0001_AC.pdf (accessed on: 24.11.2021).

PETIT, N. 2017. Law and Regulation of Artificial Intelligence and Robots – Conceptual Framework and Normative Implications. *European University Institute – Department of Law (LAW)*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931339 (accessed on: 24.11.2021).

PROMETEA, F. A. Artificial Intelligence in the Judicial System of Argentina. *Medium* 2020. https://medium.com/astec/prometea-artificial-intelligence-in-the-judicial-system-of-argentina-4dfbde079c40 (accessed on: 24.11.2021).

RABBITTE, P. 2019. Estonia to Empower AI-Based Judge in Small Claims Court. *150 SEC* 2019. https://150sec.com/estonia-to-empower-ai-based-judge-in-small-claims-court/10985/ (accessed on: 24.11.2021).

RABINOVICH-EINY, O.–KATSH, E. 2017. Access to Digital Justice: Fair and Efficient Processes for the Modern Age. *Cardozo Journal of Conflict Resolution* 18.

RASO, F. A. et al. 2018. Artificial Intelligence & Human Rights: Opportunities & Risks. *Berkman Klein Center Research Publication* 6. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259344 (accessed on: 24.11.2021).

REILING, D. 2020. Courts and Artificial Intelligence. *International Journal for Court Administration* (11). https://www.iacajournal.org/articles/10.36745/IJCA.343/ (accessed on: 24.11.2021).

RISSE, M. 2018. *Human Rights and Artificial Intelligence: An Urgently Needed Agenda*. https://carrcenter.hks.harvard.edu/files/cchr/files/humanrightsai_designed.pdf (accessed on: 24.11.2021).

RODRIGUES, R. 2020. Legal and Human Rights Issues of AI: Gaps, Challenges and Vulnerabilities. *Journal of Responsible Technology* 4. https://www.

sciencedirect.com/science/article/pii/s2666659620300056 (accessed on: 24.11.2021).

ROSIN, X.–LAMPOS, V. 2018. *In-Depth Study on the Use of AI in Judicial Systems, Notably AI Applications Processing Judicial Decisions and Data. European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment*. Strasbourg. https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c (accessed on: 24.11.2021).

ROTH, A. L. 2016. Trial by Machine. *Georgetown Law Journal* 104. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2743800 (accessed on: 24.11.2021).

SALTER, S. H. 2017. Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal. *Windsor Yearbook of Access to Justice* 34.

SCHERER, M. U. 2016. Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies. *Harvard Journal of Law & Technology* 29. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609777 (accessed on: 24.11.2021).

SIBOE, N. 2020. Use of Artificial Intelligence by the Judiciary in the Face of COVID-19. *Oxford Human Rights Hub* 2020. https://ohrh.law.ox.ac.uk/use-of-artificial-intelligence-by-the-judiciary-in-the-face-of-covid-19/covid-19/ (accessed on: 24.11.2021).

SNEHANSHU, S. 2021. Supreme Court Embraces Artificial Intelligence, CJI Bobde Says Won't Let AI Spill Over to Decision-Making. *India Today* 04.07.2021. https://www.indiatoday.in/india/story/supreme-court-india-sc-ai-artificial-intellegence-portal-supace-launch-1788098-2021-04-07 (accessed on: 24.11.2021).

SOLTAU, S. 2020. Behind the Headlines: Doubts about China's 'Robot Judges'. *Medium* https://sebastian-soltau.medium.com/behind-the-headlines-doubts-about-chinas-robot-judges-20ce83862980 (accessed on: 24.11.2021).

SOURDIN, T. 2015. Justice and Technological Innovation. *Journal of Judicial Administration* 25.

2018. Judge v Robot? Artificial Intelligence and Judicial Decision-Making. *UNSW Law Journal* 41. https://doi.org/10.53637/ZGUX2213 (accessed on: 24.11.2021).

SZÉKELY, J. 2019. Lawyers and the Machine. Contemplating the Future of Litigation in the Age of AI. *Acta Universitatis Sapientiae. Legal Studies* 8. http://acta.sapientia.ro/acta-legal/C8-2/legal82-06.pdf (accessed on: 24.11.2021).

ULENAERS, J. 2020. The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge? *Asian Journal of Law and Economics* 11. https://doi.org/10.1515/ajle-2020-0008 (accessed on: 24.11.2021).

VERHEIJ, B. 2017. Proof with and without Probabilities. *Artificial Intelligence and Law* 26.

VOLOKH, E. 2019. Chief Justice Robots. *Duke Law Journal* 68. https://dlj.law.duke.edu/article/chief-justice-robots-volokh-vol68-iss6/ (accessed on: 24.11.2021).

WALTON, D. 2020. When Expert Opinion Evidence Goes Wrong. *Artificial Intelligence and Law* 27.

WARREN, M. (Chief Justice). 2015. Embracing Technology: The Way Forward for the Courts. *Journal of Judicial Administration* 24. https://courtofthefuture.org/publications/embracing-technology-the-way-forward-for-the-courts/ (accessed on: 24.11.2021).

XUAN, H. 2021. One-Click Access to Evidence Analysis Results. Hangzhou Internet Court Launches Intelligent Evidence Analysis System. *China Courts Network* 2021. https://www.chinacourt.org/article/detail/2019/12/id/4747683.shtml (accessed on: 24.11.2021).

YILMAZ, O. G. 2019. Using AI in Judicial Practice – Can AI Sit on the Bench in the Near Future? *Law Justice Review* 10. https://yayin.taa.gov.tr/yuklenenler/dosyalar/dergiler/law/law-19/law19.pdf (accessed on: 24.11.2021).

ZHU, M. 2019. Hangzhou Internet Court Pilot Application 'AI Assistant Judge'. *Hangzhou News* 14.06.2019. https://hznews.hangzhou.com.cn/jingji/content/2019-06/14/content_7210416.htm (accessed on: 24.11.2021).

ZŐDI, Z. 2018. The Code of AI and Human Laws. *Acta Universitatis Sapientiae. Legal Studies* 8.

*** *AI Judges, Verdicts via Chat App: Brave New World of China's Digital Courts*. 2019. *Business Standard*. https://www.business-standard.com/article/pti-stories/ai-judges-and-verdicts-via-chat-app-the-brave-new-world-of-china-s-digital-courts-119120600902_1.html (accessed on: 20.04.2021).

*** https://ialab.com.ar/pretoria/ (accessed on: 24.11.2021).

*** https://legal.thomsonreuters.com/en/products/westlaw-a?abcd=b&cid=9005579&sfdccampaignid=7011B000001xaeFQAQ&chl=na&adobe_mc_sdid=SDID%3D26D8151462EDEB46-453868D00CF2F4D3%7CMCORGID%3DA7D63BC75245AE300A490D4D%40AdobeOrg%7CTS%3D1618770150&adobe_mc_ref=https%3A%2F%2Fabovethelaw.com%2F (accessed on: 24.11.2021).

*** https://www.alexsei.com/solution/#structure (accessed on: 24.11.2021).

*** https://www.lexisnexis.com/en-us/products/lexis.page (accessed on: 24.11.2021).

*** https://www.netcourt.gov.cn/ (accessed on: 24.11.2021).

*** https://www.relativity.com/data-solutions/ediscovery/ (accessed on: 24.11.2021).

*** https://www.youtube.com/watch?v=KQZxwbkm0sg (accessed on: 24.11.2021).

*** https://blog.anylaw.com/2020/06/10/new-machine-learning-technology-by-anylaw-disrupts-20b-legal-research-industry/ (accessed on: 24.11.2021).

*** *Online Courts and Online Dispute Resolution in Terms of the International Standard of Access to Justice*. http://plaw.nlu.edu.ua/article/view/201782 (accessed on: 24.11.2021).

*** http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-Core-_031915.pdf (accessed on: 24.11.2021).

*** *What's the Magic of the Internet Justice China Program Cyberspace Administration of China?* 2019. http://www.cac.gov.cn/2019-12/12/c_1577686244875634.htm (accessed on: 24.11.2021).

*** Case of Taxquet v Belgium, European Court of Human Rights, Application No. 926/05. 13 January 2009. https://hudoc.echr.coe.int/eng?i=001-101739 (accessed on: 24.11.2021).

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Informatization of Civil Proceedings in Poland. Conclusions *de lege lata*

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Abstract. The informatization of civil proceedings is regulated in Poland by the use of several instruments pertaining to various aspects of civil procedure. The author presents the most relevant instruments and their major provisions in the context of what may be called 'normal' circumstances and also as they were amended to suit the needs of the judiciary during the COVID-19 pandemic. Submission of pleadings via the dedicated ICT (information and communication technology) system of the courts is presented, as is the electronic delivery service meant to facilitate the service of procedure and the communication of procedural documents in Poland (especially in the future). The rules applicable to open hearings and recording of hearings, as well as their transmission, are presented. The relatively novel rules on the taking of electronic evidence and on rendering an 'e-judgment' are also referred to.

Keywords: informatization, civil procedure, electronic service of procedure, electronic court submission system, access to courts via video and audio link, e-judgement, Poland

1. Introduction

The informatization of civil proceedings is a process that has been going on for 20 years, and, currently, the regulations governing it are dispersed in several acts. First of all, the regulations on informatization are included in the Code of Civil Procedure (CCP) but also in the Law on the system of common courts, in the Act on the electronic delivery service [Art. 131(2) of the CCP], in the Act on land and mortgage registers and on mortgage, in the Act on the registered pledge and register of pledges, in the Act on the National Court Register, and in the Code of Commercial Companies. However, it should be noted that the provisions regulating the main registration proceedings can be found in the Code of Civil Procedure.

The provisions of civil procedure regarding the informatization of this procedure have now been shaped by the amendment to the Code of Civil Procedure of 10 July 2015. This amendment entered into force on 8 September 2016. Due to their detailed and very extensive regulation, this study does not cover enforcement and bankruptcy proceedings, not even in terms of their informatization.

2. Submission of Pleadings via the ICT System

The above amendment introduced the model of submitting pleadings. These pleadings can only be filed 'via the ICT system',[1] and therefore, unlike in administrative proceedings, via electronic means of communication or via electronic data carriers.[2] This method of submitting pleadings in civil proceedings applies to general examination proceedings (Art. 125 of the CCP), separate proceedings (electronic proceedings by writ of payment), registration proceedings (in land and mortgage register proceedings, registration proceedings for entry in the National Court Register), and security and enforcement proceedings alike.

The provision introducing the principle discussed above is Art. 125, section 2(1a) of the CCP, which provides that a party may choose to submit pleadings via the ICT system, which is admissible if, for technical reasons attributable to the court, it is possible. Submitting pleadings via the ICT system may therefore take place (1) when a special provision stipulates that the submission of pleadings can be done only through the ICT system or (2) when a party has made a choice to submit pleadings via this system. However, it should be noted that such a special provision stipulating that pleadings are filed only through the ICT system is Art. 505(11), section 1 of the CCP[3] and electronic land and mortgage register proceedings, in which a notary public, a court bailiff, and the head of the tax office submit applications for entry in the land and mortgage register only via the ICT system. From 1 March 2021, in the registration proceedings pending before the registration court in the case on entry in the National Court Register, where the actions in the registration proceedings are conducted via the ICT system supporting the court proceedings, the party submits the application via this system, excluding the means of appeal considered by the Supreme Court. What is significant, however, is that the provision of Art. 125, section 2(4) of the CCP does not apply to registration proceedings, i.e. it is not possible to resign from the electronic means in keeping contact with the court. The same exemptions can be

1 ICT is taken to mean 'information and communication technologies' in this context.

2 Gołaczyński–Szostek 2020. In the period of the COVID-19 epidemic, the courts allowed various possibilities of submitting pleadings in Poland.

3 The plaintiff brings a claim in these proceedings only via the ICT system, as well as the defendant if he or she chooses this way of communication with the court.

found in the provisions regulating electronic proceedings by writ of payment and land and mortgage register proceedings.

Based on Art. 125, section 1(1a) of the CCP, a party may choose to submit pleadings electronically when the technical conditions on the part of the court allow it. It may happen that courts will be gradually provided with an ICT system supporting court proceedings.

In a situation where a party initiates electronic contact with the court (when the party has the option to choose), the rule that the party, but also the party's representative, may resign from submitting pleadings via the ICT system will apply [Art. 125, section 2(4) of the CCP]. The pleading is provided with a qualified electronic signature, a trusted or personal signature (Art. 126, section 5 of the CCP). In accordance with the delegation of legislative powers under Art. 126, section 6 of the CCP, the Minister of Justice issued the Regulation of 2016 on the procedure for setting up and sharing an account in the ICT system that supports court proceedings.[4] The provision of Art. 128, section 2 of the CCP is also worth mentioning, which provides for the manner of appending attachments to the pleading submitted via the ICT system. The attachments are submitted via the ICT system with the proviso that the certification of compliance with the original takes place by submitting the documents to the ICT system. The electronic certification by a professional representative is an official document (Art. 129, section 3 of the CCP).

Another provision that is important from the point of view of electronic submission of pleadings is Art. 125, section 2^3 of the CCP, which regulates the consequence of the inability to submit a pleading for technical reasons. According to this provision, when for technical reasons attributable to the court it is not possible to submit the pleading via the ICT system within the required time limit, the provisions of Art. 168–172 of the CCP apply. Therefore, the regulations concerning the reinstatement of the time limit apply directly. However, the above legal solution assumes that the reason for the failure lies with the court, not the party.[5]

In the case of submitting pleadings via the ICT system, there are certain distinctions relating to the payment of court fees. Thus, when a special provision stipulates that the pleading must be filed only through the system, the pleading must be filed together with the fee. Therefore, this only applies to situations where a special provision requires the submission of pleadings electronically, i.e. in electronic proceedings by writ of payment, electronic land and mortgage register proceedings. In such a case, which essentially applies to electronic proceedings by writ of payment, in a situation when several pleadings subject to payment are

4 From 1 July 2021, the delegation to issue this regulation has been moved to Art. 53d of LSCC.

5 See also Goździaszek 2021. 140; Gołaczyński 2016; Gołaczyński–Szostek (eds.). 2016. 143 et seq.; Jakubecki (ed.). 2017. 280.

filed simultaneously, none of these pleadings will have a legal effect if the fee has not been paid for all the pleadings. If the pleadings are submitted in breach of this obligation, the presiding judge informs the person submitting the pleadings that they have not produced any effect. Of course, this does not apply to parties exempt from court costs. If the choice to submit the pleadings via the ICT system has been made, the fee is payable according to general principles.

The obligation to prove one's authorization with a document at the first procedural step does not apply when it is possible for the court to ascertain the authorization on the basis of a list or other register to which the court has access by electronic means, and also when the procedural action is performed via the ICT system and a special provision states that a pleading may only be filed through this system. In this case, the legal representative, the authorities, and persons mentioned in Art. 67 of the CCP are required to indicate the basis of their authorization. Therefore, in the case of electronic proceedings by writ of payment, it is sufficient for the party's representative to refer to his or her authorization and the legal representative to the power of attorney. In these proceedings, there is no obligation to attach to the pleading a document confirming authorization to act on behalf of a party, or a power of attorney (submission of pleadings takes place only through the ICT system (by the plaintiff), and when the defendant chooses to submit pleadings in this way). The provision of Art. 125, section 2(4) of the CCP (lack of possibility of resigning from submitting pleadings in this way) does not apply. Moreover, Art. 126 section 3 of the CCP does not apply to the electronic proceedings by writ of payment, i.e. there is no obligation to attach a power of attorney or evidence to the statement of claim or other pleadings, e.g. objection to the payment order.[6]

On the other hand, in electronic land and mortgage register proceedings, a notary public, a court bailiff and the head of the tax office may submit an application for entry only via the ICT system.[7] However, this application is provided with

6 Art. 128 of the CCP does not apply.

7 The application for entry in the land and mortgage register on the basis of the enforceable order referred to in Art. 783, section 4 of the CCP (electronic enforceable order) must be accompanied by a document obtained from the ICT system enabling the court to verify the existence and content of the enforceable order. A notary public and a court bailiff submit an application for entry only via the ICT system. The head of the tax office submits an application for entry in sections III and IV of the land and mortgage register only via the ICT system. Such an application is provided with a qualified electronic signature. The application must be accompanied by the documents constituting the basis for the entry in the land and mortgage register if they have been prepared in an electronic form. Documents constituting the basis for entry in the land and mortgage register, not prepared in an electronic form, are sent by the notary public, bailiff, and the head of the tax office to the court competent to keep the land and mortgage register within three days from the date of submitting the application for entry. If an application for entry in the land and mortgage register submitted by the head of the tax office is subject to a fee, the provisions of Art. 130, sections 6 and 7 of the CCP do not apply. The head of the tax office sends the proof of payment to the court competent to keep the land and mortgage register along with

only a qualified electronic signature.[8] In these proceedings, the provisions of art-s 128 and 129 of the CCP do not apply because the documents that are the basis for the entry are not attached to the application electronically but sent in a written form within three days from the date of submitting the application. When the application is submitted by a notary public or bailiff, the obligation to correct or supplement the application rests with the parties to notarial acts or the creditor. The notary public is the legal representative of the party that performs the notarial act but only submits an application for entry on the basis of a notarial deed, which he or she draws up, and then submits the documents constituting the basis for the entry to the court.[9]

Since the submission of pleadings via the ICT system will result in the gradual creation of electronic files, it should be pointed out that the case files may be created and processed with the use of IT technologies. Pursuant to the provisions of Art. 53 § 1a–1c of LSCC, which entered into force on 1 December 2020, the ICT system supporting court proceedings, in which the files of the case are created and processed, is maintained by the Minister of Justice, who is also the administrator of this system. However, the Minister of Justice, even as the administrator of the ICT system that supports court proceedings, does not have access to the files of the proceedings. A court document obtained from this ICT system has the power of a document issued by the court, provided that it has features that enable its verification in this system (Art. 53a § 1 of LSCC, see: Regulation of the Minister of Justice on the method and features enabling verification of the existence and content of a pleading in the ICT system supporting court proceedings).[10]

3. Electronic Delivery Service

Pursuant to Art. 131(1), section 1 of the CCP, the court performs electronic service if the addressee has submitted the pleading via the ICT system or if the addressee has chosen to submit the pleadings via this system. The addressee who has

the documents constituting the basis for the entry. If the creditor has been exempted from court fees for the application for entry in the land and mortgage register, the head of the tax office sends a final court decision regarding the exemption from court fees to the court competent to keep the land and mortgage register together with the documents constituting the basis for the entry. In the case of applications submitted by notaries and bailiffs, the obligation to correct or supplement the application rests with the parties to notarial acts or the creditor, respectively. The court also notifies the bailiff about the creditor's obligation to correct or supplement the application through the ICT system, indicating the type of formal defects that prevent the application from being properly processed. The hour, minute, and second of submitting the application into the ICT system are considered to be the moment when the application for entry submitted via the system is received.

8 There is no possibility to use a trusted or personal signature.

9 Gołaczyński 2020. 35 et seq.

10 *Journal of Laws* of 2016, item 1422.

chosen to submit pleadings via the system may resign from delivery service via this system [Art. 131(1), section 2(1) of the CCP]. This rule will not be applied when a special provision stipulates that the pleading may be submitted only through the ICT system (in electronic proceedings by writ of payment, electronic land and mortgage register proceedings and registration proceedings for entry in the register of entrepreneurs of the National Court Register). It should be noted that in each case of electronic delivery service, i.e. both when a special provision requires filing pleadings electronically and when a party has chosen to submit pleadings electronically, the provision of Art. 134 of CCP does not apply. It is assumed that this limitation applies only to delivery service done by post due to the protection of domestic peace.

The delivery service takes place at the moment indicated in the electronic confirmation of receipt or after 14 days from the date of submitting the pleading in the ICT system. Pursuant to the provisions of the Regulation of the Minister of Justice issued according to Art. 131(1), section 3 of the CCP, the delivery service takes place by logging in to the ICT system unless, for reasons attributable to this system, access to the content of the pleading is not available. However, pleadings and decisions are served in the form of copies (Art. 140, section 1 of the CCP), but in this case a copy of the pleading may be obtained from the ICT system provided that it has features that enable verification of the existence and content of the pleading or judgment in this system.

It should also be indicated that on 1 October 2022 the provision of Art. 131(2), sections 1–2 of the CCP will come into force, which stipulates that, if the technical and organizational conditions of the court make it possible, the delivery service will be made to the address for electronic delivery referred to in Art. 2, point 1 of the Act of 18 November 2020 on the electronic delivery service,[11] entered into the database of electronic addresses referred to in Art. 25 of AEDS, and, in the absence of such an address, to the address for electronic delivery service connected with the qualified electronic registered delivery service, from which the addressee submitted the pleading. For the purposes of judicial civil proceedings, the effects of the Act on the electronic delivery service will be significantly deferred compared to non-judicial procedures (by eight years), as, pursuant to Art. 155, paragraph 7 of AEDS, courts will be obliged to apply the provisions of the Act on the delivery service of correspondence using the public service of electronic registered delivery service or public hybrid service only from 1 October 2029.

As a result of the provisions of AEDS, all main procedures (administrative and court: civil, criminal, court-administrative) will start to perceive electronic delivery service as the basic tool for the circulation of correspondence. This means that, from the point of view of the parties to these proceedings and their

11 Act of 18 November 2020 on electronic delivery service (*Journal of Laws* of 2020, item 2320); hereinafter referred to as AEDS.

representatives, the era of registered paper mail will in principle end. The current method of creating pleadings (including their printing) and sending them (with the use of the services of the postal operator) will change in favour of the introduction of the e-Delivery application, allowing for sending and receiving electronic correspondence, which is an equivalent of a registered mail or mail with return confirmation of receipt.[12]

This brief discussion shows that some parties to civil proceedings (entrepreneurs) and their professional representatives will obligatorily receive court correspondence to their electronic delivery service address entered in the database of electronic addresses and connected with the public service of electronic registered delivery service or the qualified electronic registered delivery service. The question that should be asked is how the regulations of AEDS will look like between the court and entities that are not obliged to have a special address for electronic delivery service, which, in principle, means natural persons who do not conduct business activities (after all, they constitute a large number of the parties and participants in civil proceedings in Poland).[13]

12 Gołaczyński (ed.) 2021. 79 et seq.

13 Gołaczyński (ed.) 2021. 79 et seq. In the cited book, M. Dymitruk indicates that: 'according to the legal definition contained in Art. 2, point 1 of AEDS, the address for electronic delivery service is the electronic address referred to in Art. 2, point 1 of the Act of 18 July 2002 on providing services by electronic means, of an entity using the public service of electronic registered delivery service or public hybrid service, or qualified electronic registered delivery service, which enables an unambiguous identification of the sender or addressee of data sent as part of these services. It follows from the above that entities wishing to have an address for electronic delivery service will be able to use the following types of addresses: an address intended for the public service of electronic registered delivery service (hereinafter, for the sake of simplicity, referred to as "public address for electronic delivery service", or "public address" for short); an address intended for the qualified electronic registered delivery service (hereinafter, for the sake of simplicity, referred to as "electronic delivery service address from a qualified supplier", or "qualified address" for short). In order to create a public address, it is generally necessary to apply for its creation to the minister responsible for informatization. To create a qualified address, it is necessary to contact a qualified trust service provider. Public entities (including courts) will obligatorily have public addresses for delivery service and will not be able to resign from them, while non-public entities will be entitled to resign from the public service of electronic registered delivery service. However, if the resignation from the public address will concern entities that, pursuant to Art. 9, paragraph 1 of AEDS, will be obliged to have an address for electronic delivery service, this resignation will be possible only if the entity has a qualified electronic registered delivery service entered in the database of electronic addresses. Professional legal representatives will be able to choose whether they prefer to use a public address or an electronic delivery service address from a qualified supplier. There are no obstacles for these entities to have both a public address and a qualified address, although in principle for each entity only one address for electronic delivery service is entered in the database of electronic addresses. Art. 32, paragraph 2 of AEDS clarifies that in the case of a natural person who is an entrepreneur entered in the Central Registration and Information on Business, as well as an attorney, legal advisor, tax advisor, restructuring advisor, notary public, patent attorney, attorney at the General Prosecutor's Office of the Republic of Poland, and a court bailiff, the database of electronic addresses will include the address for electronic delivery service for the purpose of running a business, practising a profession or performing official duties, regardless of the address for electronic delivery service of that person

On the other hand, a different solution for the delivery service of correspondence in registration proceedings is provided for in the Act of 26 January 2018 amending the Act on the National Court Register and certain other acts,[14] which became the basis for the creation of the Portal of Court Registers.[15] And so, in the registration proceedings before the registration court in a case for entry in the National Court Register, the provision of Art. 125, section 2(4) of the CCP does not apply from 1 March 2021, i.e. it is not possible to resign from electronic communication in contact with the court.

Finally, the episodic solution adopted for delivery service in civil proceedings during the COVID-19 pandemic[16] cannot be overlooked. Therefore, Art. 15zzs[9], paragraph 2[17] states 'that in the period specified in paragraph 1, if it is not possible to use the ICT system that supports the court proceedings, the court delivers court pleadings to an attorney, legal advisor, patent attorney, or the General Prosecutor's Office of the Republic of Poland by placing their content in the ICT system used for the purpose of sharing such pleadings (information portal). This does not apply to pleadings that are subject to delivery service together with copies of the parties' pleadings or other documents not originating from the court. The date of delivery is the date on which the recipient reads the pleading placed on the information portal. If the pleading is not read, it is considered as delivered after 14 days from the date of placing the pleading on the information portal. The delivery service of a pleading via the information portal produces procedural effects specified in the Code of Civil Procedure, appropriate for the delivery service of a court pleading. The presiding judge orders the waiver of the delivery service of a pleading via the information portal if the delivery service is impossible due to the nature of the pleading.

4. Remote Open Hearing

Conducting a remote trial in open court or a remote open hearing (delocalized trial) was regulated by the provision of Art. 151 § 2 of the CCP, according to

entered in the database of electronic addresses for purposes not related to running a business, practising a profession, or performing official duties.'

14 Act of 26 January 2018 amending the Act on the National Court Register and certain other acts (*Journal of Laws* of 2018, item 398); hereinafter referred to as: the Act introducing the Portal of Court Registers.

15 https://prs.ms.gov.pl/ (accessed: 10 October 2021).

16 According to Łukowski 2020.

17 Act of 28 May 2021 amending the Code of Civil Procedure and certain other acts, taken together with the Act of 2 March 2020 on specific solutions related to the prevention, counteraction, and eradication of the COVID-19, other infectious diseases and crisis situations caused by them, in provisions of Art. 15zzs[9] made the civil delivery service with the use of the Information Portal for professional legal representatives obligatory.

which the presiding judge may order an open hearing with the use of technical devices enabling it to be conducted remotely. In such a case, the participants to the proceedings may be present in the court session when they are in the building of another court and perform procedural actions there, and the course of procedural actions is transmitted from the court room of the court conducting the proceedings to the place of stay of the participants to the proceedings and from the place of stay of the participants to the proceedings to the court room of the court conducting the proceedings. This regulation is undoubtedly an exception to the previous rule that court sessions are held in the court building. On the other hand, outside the court building, sessions are held when court actions must be performed elsewhere or when holding a session facilitates the conduct of the case or contributes to saving the costs of the proceedings. This is applied to situations when, for example, it is necessary to hear a person suffering from an illness or disability, in which case the hearing is held in the place where these persons are staying (Art. 263 of the CCP), or when it is necessary to inspect an object that cannot be delivered to the court building. The provision of Art. 151 § 2 of the CCP introduces the possibility of holding a remote open hearing via videoconference upon the presiding judge's order. This provision is an extension to Art. 235 § 2 of the CCP, which allowed for the taking of evidence at a distance and was introduced into the Code of Civil Procedure in order to adjust Polish law to the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.[18]

The provision of Art. 15zzs[1] of the Coronavirus Act in the wording established in Art. 4 of the Act of 28 May 2021 amending the Act – Code of Civil Procedure and certain other acts substantially changed the Act of 2 March 2020 and stipulates that during the period of an epidemic threat or epidemic due to COVID-19 and within one year from the cancellation of the last of them in cases examined under the provisions of the Code of Civil Procedure, a trial in open court or an open hearing is held with the use of technical devices enabling their conduction at a distance with the simultaneous direct transmission of image and sound, except that the persons participating in it, including members of the adjudicating panel, do not have to be in the court building. Currently, this provision stipulates that holding an open hearing by videoconference is the rule, and it should be applied, with the omission of the provision of Art. 151 § 2 of the CCP, in the period after the announcement of an epidemic threat or epidemic due to COVID-19 and one year after their announcement. This understanding of a remote trial in open court is also supported by Art. 15zzs[1], paragraph 1, point 2 of the Coronavirus Act, according to which the conduct of a remote hearing may be waived only if the examination of the case at a trial in open court or open hearing is necessary and their conduct in the court building does not pose a threat to the health of the

18 *Official Journal of the European Union* L 199/1.

persons participating in them; the waiver, however, requires the consent of the president of the court. A remote trial in open court or a remote open hearing is currently a rule that may be departed from only exceptionally, and additionally with the consent of the president of the court. This solution is also supported by the right of the presiding judge, who may refer the case to a closed hearing in order to examine the case, if a remote hearing cannot be held (e.g. for technical reasons) and a trial in open court or an open hearing is not necessary. In the event that a party is technically not able to participate in the hearing, Art. 15zzs[1], paragraph 2 of the Coronavirus Act imposes an obligation on the court to provide the party or the summoned person with the possibility to participate in a remote hearing in the court building. The party or the person summoned (e.g. a witness, an expert) proves in the application that he or she does not have technical devices enabling participation in a remote hearing outside the court building. However, the request in this matter must be submitted within 5 days from the date of the summons. Therefore, only technical reasons, and only those remaining on the part of the court, will result in referring the case to a closed hearing (Art. 15zzs[1], paragraph 1, point 3 of the Coronavirus Act). The provision of art. 15zzs[1], paragraph 1, point 1 of the Coronavirus Act also restricts the simultaneous presence at a time and place at a trial in open court or an open hearing of the adjudicating panel. In the previous version of Art. 15zzs[1], point 3, the president of the court could order that exclusively the members of the panel, with the exception of the presiding judge and the reporting judge, may participate in the hearing by electronic means of communication, except for the hearing at which the case is closed. In the case of a multi-person adjudicating panel, pursuant to an order of the president of the court issued in accordance with Art. 15zzs[1], paragraph 1, point 3 of the Coronavirus Act, only the presiding judge and the reporting judge will participate in a trial in open court or an open hearing, and the other members of the panel via electronic means of communication. The concept of 'electronic means of communication' was defined in the Act of 18 July 2002 on providing services by electronic means.[19] Therefore, there was no need for the members of the adjudicating panel to communicate via the ICT system supporting the transmission of video and sound at a distance, and only an ordinary Internet communicator tool, such as Messenger, WhatsApp, e-mail, etc., was sufficient.

19 Art. 2, point 5 of the Act on providing services by electronic means defines these means as: 'technical solutions, including ICT devices and software tools cooperating with them, enabling individual communication at a distance using data transmission between ICT systems, in particular by e-mail'.

5. Taking Evidence in the Form of an Electronic Document

Amendments to the Civil Code concerning the concept of document, its definition, and new forms of documentary instruments (paper-based and electronic) also necessitated changes to the provisions of the Code of Civil Procedure in the scope of documentary evidence.

Documentary evidence has been regulated in section 2, *Documents*, in the chapter regulating the taking of evidence. The problem was that, until now, only paper documents containing text were understood as a 'document' in a procedural sense, whereas the so-called other means of evidence were regulated in art-s 308 and 309 of the CCP. Currently, as a result of the amendment to the Code of Civil Procedure of 10 July 2015, any medium containing information is considered as a document, and it was necessary to clearly indicate that in accordance with Art. 243^1 of the CCP the provisions on the documentary evidence (section 2) will be applied to documents containing text, enabling their issuers to be identified. Therefore, those will be documents containing text regardless of the medium on which they were written or recorded – paper documents and electronic documents.

Therefore, when using the term 'electronic form of a document', the legislator does not refer to an electronic form of a legal deed under Art. 78^1 of CC. After all, a document may be in an electronic form, even if its content has not been provided with a qualified electronic signature but only with an ordinary electronic signature, or even if it does not contain any signature. In the latter case, it is a documentary form of a legal deed. The documentary form can be paper or electronic (e.g. an e-mail containing a declaration of will).[20] The Code of Civil Procedure also contains a definition of an official and private document, but it does not indicate the form in which these documents are to be prepared (written, electronic), but it only refers to special provisions regulating the preparation of official documents.

It should also be pointed out that private law already includes documents that are in an electronic form and are classed as official documents. For example, court actions are taken in electronic proceedings by writ of payment, in which the court issues an order for payment in an electronic form. The same applies to the decision granting an enforcement clause to such an enforcement order (Art. 783 of the CCP).[21] If the proceedings were initiated via an ICT system, the court will be able to issue a judgment in an electronic form (Art. 324 § 2 of

20 Kaczmarek 2008. 248–252; see also Marszałkowska-Krześ–Rudkowska-Ząbczyk 2010. 356; Szostek–Świerczyński 2007; Szostek–Świerczyński 2009.

21 Jakubecki (ed.) 2010. 1011.

the CCP).[22] Another situation is the use of electronic copies, extracts, certificates from court registers that operate in an electronic form. From the provision of Art. 4, paragraph 3 of the Act on the National Court Register,[23] it follows that the central information service issues copies, extracts, certificates and provides information from the register, which have the force of official documents if they have been prepared in a paper or electronic form. Printouts made from electronic documents have the power of official documents if they have features that enable their verification with the data contained in the register. Like in the economic register (NCR), a similar solution was introduced in the Act on land and mortgage registers and mortgage.[24] Until 1 December 2013, access to the land and mortgage register via the Internet was given pursuant to the Regulation of the Minister of Justice on establishing and keeping the land and mortgage registers in an IT system,[25] and pursuant to § 3 paragraph 1 of this Regulation, viewing the land and mortgage register consisted in displaying the required land and mortgage register on the screen of a monitor. Therefore, the provision of § 3 paragraph 2 of this Regulation made it possible to entrust the tasks related to the viewing of land and mortgage registers to the Central Information on Land and Mortgage Registers.[26] By the Act of 24 May 2013 amending the Act on land and mortgage registers and mortgage,[27] changes were made, among others, in Art. 36^4 of ALMRM, according to which the information from the central database of land and mortgage registers is provided by the Central Information on Land and Mortgage Registers, with branches at divisions of district courts keeping land and mortgage registers. Then it was clarified in this provision that the Central Information issues, upon request, copies of land and mortgage registers, extracts from land and mortgage registers, and certificates of closure of land and mortgage registers kept in the IT system. The copies, extracts, and certificates referred to in Art. 36^4, paragraph 2 of ALMRM, issued by the Central Information, have the power of documents issued by a court. Finally, it is possible to submit the above-mentioned requests via the ICT system. In such a case, the Central Information makes it possible to print these documents on your own via the ICT system. Printouts of these documents have the power of documents issued by a court if they have features that enable their verification with the data contained in the central database of land and mortgage registers.[28]

22 Gołaczyński 2020. 215; Cieślak 2016. 13 et seq.
23 Act of 20 August 1997 on the National Court Register (*Journal of Laws* of 2016, item 687).
24 Act on land and mortgage registers and mortgage (*Journal of Laws* of 2016, item 790).
25 Regulation of the Minister of Justice of 20 August 2003 on establishing and keeping the land and mortgage registers in an ICT system (*Journal of Laws* of 2013, item 695).
26 Leśniak. 21 et seq.
27 Act of 24 May 2013 amending the Act on land and mortgage registers and mortgage (*Journal of Laws* of 2013, item 941).
28 Gołaczyński–Klich 2016.

The distinction between private and official documents is important in terms of evidentiary value, as stated in art-s 244 and 245 of the CCP.[29] It should only be indicated that Art. 245 has been changed and supplemented with an electronic form. This means that a private document made in a written or electronic form is evidence that the person who signed it made the declaration contained in the document. There is no such presumption for private documents drafted in a documentary form. The reason for such a regulation is the lack of a signature in the document stating that the declaration of will has been submitted, regardless of the form of the signature (handwritten, electronic, or electronic as equivalent to a handwritten one).[30] The presumption of origin of the declaration of will contained in a private document from the person who signed it means that the declaration was made by the issuer of this document. However, it cannot be inferred from such a declaration that it is true.[31] Sometimes this presumption is equated with the presumption of truthfulness and authenticity of the document.[32] It is also assumed that the presumption of truthfulness of a document and its origin differ from each other. In particular, there may be a situation where a person has signed a document without content, and the person who filled the document with content other than the original agreement may not rely on the presumption of the origin of the declaration from the person who signed the document.[33]

When returning to the issue of depriving a private document prepared in a documentary form of such a presumption, it should be stated that the party relying on such a document will not be protected by the presumption, i.e. when the opposing party denies the origin of such a document.[34] In a situation where the declaration of will has been submitted by electronic recording on a carrier, such as an e-mail, the person who refers to such a declaration must prove that it was sent from the mailbox of a specific person and that this action was performed at the time when this person had access to the Internet. It may be helpful to present the IP number of the computer from which the message was sent. In a situation where the declaration was recorded in a different way, e.g. by videophone, the recording should be played. However, in such a case, it is

29 The presumption of conformity with the actual state of an official document only applies to narrative documents, according to Knoppek 1993. 70.

30 In a situation where it is possible to establish the author of the declaration of will prepared in a documentary form, there will be no presumption under Art. 245 of the CCP. In the absence of a handwritten or electronic signature under Art. 78^1 of CC, or if the author of the declaration of will cannot be identified, we are dealing with an anonym, which cannot be used as evidence. As for the latter, see more: Knoppek 1993. 115; Judgment of the Supreme Court of 9 December 1980, II URN 171/80, SP 1981, issue 7, item 126; Siedlecki 1981. item 126. However, there is also the view that an anonym is a document but cannot be used as evidence in a civil lawsuit, according to Ereciński 1985. 76.

31 Decision of the Supreme Court of 15 April 1982, III CRN 65/82, Lex No. 8414.

32 Berutowicz 1972. 146; Siedlecki 1987. 263; Rudkowska-Ząbczyk 2010. 142.

33 Kaczmarek-Templin 2013. 135–136.

34 Gołaczyński–Szostek (eds.) 2016. 196.

rather not the origin of the document that may be questioned but its truthfulness. Nevertheless, the evidentiary value of a private document is not determined only by the presumption of origin or the presumption of truthfulness. In particular, the presumption of origin of a private document is not a weaker presumption than the presumption of truthfulness.[35] The evidentiary value of a private document is determined by the court on the basis of its discretionary evaluation of evidence. In the case of private documents prepared in a documentary form, i.e. without a handwritten signature or an electronic signature equivalent to a handwritten signature (Art. 25, paragraph 2 of the eIDAS Regulation), in order to establish its truthfulness or authenticity, the rules of Art. 308 of the CCP apply. Alternatively, it should be indicated that the message was sent from a computer identified by a specific IP number, which was under the control of this person at the time of sending the content of the message.

The 2015 amendment to the civil procedural law provides for the taking of evidence from a document other than the one referred to in Art. 243^1 of the CCP, i.e. from a document that does not contain text. This situation is regulated by Art. 308 of the CCP, which states that 'evidence from documents other than those mentioned in Art. 243^1 of the CCP, in particular those containing video, audio, or video and audio recordings, are taken by the court on the basis of provisions on inspection evidence and documentary evidence accordingly'.[36] Therefore, this provision applies to documents (within the meaning of Art. 77^3 of CC) which do not contain text.[37] Declarations of will and knowledge are currently also prepared in a different way, namely with the use of modern technical means, i.e. most often an audio or audio-visual recording. In the case of such documents, the provisions on inspection evidence and documentary evidence should be applied accordingly.[38] When it comes to inspections, this means of evidence applies to material objects, but also to specific situations or places.[39] Usually, it is enough to perform an inspection to take material evidence, but often the inspection requires special knowledge, which involves the participation of an expert.[40]

The subject of inspection of a document may be its external form and not its intellectual content. In this context, it is irrelevant whether the document includes paper or electronic content, and if it is electronic, whether it is audio,

35 Judgment of the Supreme Court of 25 September 1985, IV PR 200/85, OSNCP 1986, No. 5, item 84.

36 Gołaczyński–Szostek (eds.) 2016. 200. A. Klich notes that after the amendment of 10 July 2015, the participation of an expert in taking evidence from a document will not be obligatory in the scope of verifying the truthfulness of the document. However, the level of participation of an expert in taking evidence in the scope of confirming the truthfulness of the document will be greater because special knowledge will be required to assess issues related to the recording of messages on electronic data carriers.

37 Gołaczyński–Szostek (eds.) 2016. 201.

38 Kaczmarek-Templin 2012. 169 et seq.

39 Siedlecki 2004. 246.

40 Jodłowski–Resich–Lapierre–Misiuk-Jodłowska–Weitz 2009. 441–442.

audio-video, photo, or other multimedia content. Therefore, in order to take evidence by inspection, it is necessary to perceive the document directly, most often with the senses of sight and hearing. Therefore, the possibility of taking evidence from the inspection of the intellectual content of the electronic document is rejected. The subject of the inspection may only be the data carrier on which the intellectual content has been recorded.[41] However, it should be assumed that since the provision of Art. 308 of the CCP currently provides for an inspection for the taking of evidence from the document other than the one referred to in Art. 243[1] of the CCP, it is possible to determine the content of this document. For this purpose, in the case of an electronic document, a sufficient way to perform the inspection is to submit a printed copy instead of the original – unless the opposing party objects to this and contests the authenticity or truthfulness of such a copy. This may apply to the documents referred to in Art. 129 of the CCP. The presentation of an electronic document may also consist in displaying its content on a computer monitor or by printing its content.[42] In a situation where an electronic document has an electronic signature verified by means of a valid qualified certificate, it is necessary for the holder of such a document to cooperate and make it available to the court via a private key.

In order to take evidence from a document, the possibility of obliging the holder to present it to the court was introduced. If an electronic document exists on the Internet, in electronic mail, then, in order to take evidence by inspection, its content should be recorded on an electronic carrier and included in the files, or the data contained in the IT system should be made available to the court.[43]

In the case of a document containing text, but without a handwritten or electronic signature, or electronic signature equivalent to a handwritten signature, pursuant to Art. 243[1] of the CCP, the provisions of section 2, *Documents*, should be applied. If such a document is a message sent by e-mail or by means of a mobile phone, an Internet communicator tool, communication channels on social networks, then this document will not, as already indicated above, benefit from the presumption of Art. 245 of the CCP. Therefore, in a situation where the opposing party contradicts such a document, the party that refers to this document is obliged to prove its origin from the issuer (author) and its truthfulness (authenticity). In the event that such an electronic declaration sent, e.g. by e-mail, is provided with a secure electronic signature, then it benefits from the presumption resulting from art. 25 of the eIDAS Regulation. The same will happen when the declaration is also provided with an electronic time stamp. Within the meaning of Art. 3, point 33 of the eIDAS Regulation, an electronic time stamp should be understood as data in electronic form which binds other data in electronic form to a particular time,

41 Kaczmarek-Templin 2012. 171.
42 Kaczmarek-Templin 2012. 172; Stępień 2001. 1172.
43 Kaczmarek-Templin 2012. 174.

establishing evidence that the latter data existed at that time. Pursuant to this provision, affixing a declaration with an electronic time stamp results in a certified date. It is therefore known exactly when and by whom the declaration was made. In a situation where the declaration is made by a legal person, the presumption function under Art. 245 of the CCP may also be performed by an electronic seal, which, in accordance with Art. 3, point 25 of the eIDAS Regulation is data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity. Currently, the Polish legislator has not decided to use this institution in the Polish law, but a document provided with an electronic seal in a trial before a Polish court cannot be ruled out, as the document may come from another Member State of the European Union. In such a situation, the Polish court will have to apply the eIDAS Regulation directly and include this document in the evidence material of the case.

As already indicated, it follows from Art. 308 of the CCP that for documents other than those referred to in Art. 243[1] of the CCP, the evidence by inspection is applied accordingly. Proper, and not direct, application allows the use of this evidence for the needs, as mentioned above, of examining the document – also electronic documents – to the extent in which there is no need to use special knowledge. However, it may happen that the court will use expert evidence to determine the origin of the electronic document, the lack of interference in the carrier, the data contained in the document, if it has been secured against unauthorized access (e.g. with an electronic signature or other security method). However, there may be a situation where the court will have to use special knowledge for the purposes of the inspection itself. The Supreme Court, in the judgment cited earlier, stated that the mere making of factual findings in the field of technology may require knowledge and experience in a given field, and even research apparatus. When deciding to admit expert evidence, the court should order the presentation of an electronic document to the expert or allow access to it (via ICT networks) and indicate whether and to what extent the parties should participate in these activities (e.g. by providing an access password to an electronic document or biometric data).[44]

However, when the document contains audio or audio-visual content, such evidence is taken by playing an audio or a video recording.[45] Nevertheless, it can be assumed that a video or audio recording that does not contain a declaration of will and knowledge but is a work within the meaning of copyright law, may still be considered an 'other means of evidence', as referred to in Art. 309 of the CCP.[46] This is because an audio or audio-visual recording containing information

44 Judgment of the Supreme Court of 20 June 1984, II CR 197/84, OSNC 1985, issue 2–3, item 37; Kaczmarek-Templin. 2012. 176.

45 Jodłowski–Resich–Lapierre–Misiuk-Jodłowska–Weitz 2009. 382.

46 Kaczmarek-Templin 2012. 182.

and a video as a work cannot be differentiated as a document on the one hand and as other means of evidence on the other. In the case of audio recordings, digital techniques are currently used, although in order to take such evidence the provisions on the evidence by inspection will apply accordingly (Art. 308 of the CCP). It may also be necessary to use other means of evidence, such as an expert opinion, to assess whether the recording is original. For the assessment of the content of a document in the form of a recording, the provisions on documentary evidence should be applied.[47] The court should also take into account the circumstances in which the recording was made.[48]

A document, also an electronic document, may be the subject of an expert opinion – as already mentioned – also in a situation when it can be the subject of an inspection.[49] However, in each case, when the examination of a document, especially of an electronic one, requires special knowledge, it is necessary to take such evidence.[50] In a situation where the subject of the expert opinion is an electronic document, it is usually necessary for the expert to use appropriate software. This applies when, for example, it is necessary to recover lost data. This can occur as a result of software or hardware failures. In the first case, the source of damage is a disturbance of the logical location of the data, and in the second case, damage to the carrier on which the data was recorded. Taking evidence from an electronic document requires not only scientific knowledge – which is usually possessed by an expert – but also technical knowledge. And so, in order to read a message secured with a secure electronic signature verified with a valid qualified certificate, special technical knowledge will be needed.[51]

For the evaluation of the evidentiary value of an electronic document, so-called authentication is important. This concept is understood as determining whether the content of the record has changed since its creation, determining the source of the data contained in the document, as well as verifying the truthfulness related to the recording of the data.[52] Data integrity ensures their invariability in the course

47 Łętowska (ed.) 1989. 533.

48 Judgment of the Supreme Court of 10 January 1975, II CR 752/74, Legalis; Ł. Błaszczak et al. (eds.) 2021. 553.

49 Gołaczyński–Szostek (eds.) 2016. 207.

50 Special knowledge is knowledge which is not available to the average person. This concept also depends on the current level of science. Dalka 1987. 73. The catalogue of specialties (special knowledge) is constantly changing with the development of science, according to the Resolution of the Supreme Court of 30 October 1985, IIICZP 59/86, OSN 1986, issue 9, item 140; Klich 2014. 96 et seq.

51 Judgment of the Supreme Court of 20 June 1985, II CR 197/84, OSN issue 2–3, item 37. The Supreme Court stated that establishing facts in the field of technology may require expertise and experience in a given field, and even the use of apparatus. Conducting such an examination with the participation of an expert is possible if it allows the court to make certain findings on its own. Otherwise, the expert should make such determinations as a basis for drawing up the opinion. According also to Kaczmarek-Templin 2012. 192; Klich 2016a. 142 et seq.

52 Lach 2004. 165.

of transmission and is most often achieved by using an additional file with an electronic signature or with an electronic seal. In the normative environment in force from 8 September 2016, the legislator did not provide for obligatory evidentiary proceedings with the participation of an expert in the scope of verifying the truthfulness of a pleading (from 8 September 2016 – a document). According to the amended wording of Art. 254 of the CCP, the truthfulness of the document may be verified with the participation of an expert. This provision also applies to an electronic document. This regulation is also supported by other provisions added by the amended Act of 10 July 2015, which enable the court to summon the issuer of a document prepared in an electronic form to provide access to an IT data carrier on which the document was recorded (Art. 254 § 2^1 of the CCP).[53]

When an electronic document has been encrypted, i.e. when access to it is password-protected, it is possible for the document to be saved on the computer's hard drive and thus secured with a password, fingerprint, or other biometric method, then, in accordance with Art. 254 § 2^1 of the CCP, the disclosure of a document may also consist in allowing the court (court expert) to access this document. If the holder of the document refuses to give such access (e.g. does not provide the password), then the inspection from the electronic document or the opinion of a court expert will also include the decryption of the document.[54]

6. Electronic Recording of Open Hearings

The requirement to record an open hearing with the use of sound or image and sound recording devices was introduced in the Act amending the Code of Civil Procedure of 29 April 2010, which entered into force on 1 July 2010 and affected many provisions of the Code of Civil Procedure, i.e. Art. 9, 157, 158, 238, 273, and 525. It should be remembered that the minutes are prepared by recording the course of the hearing under the direction of the presiding judge with the use of sound or image and sound recording devices, which is the principle. An exception to this principle is a case when, for technical reasons, it is not possible to record the course of a hearing with the use of sound or image and sound recording devices, when the minutes are made only in writing. At the same time, along with the recording of the image and sound or image, an abridged minutes are prepared next to the recording, containing only the indication of the court, place and date of the hearing, judges, recording clerks, parties, interveners, statutory representatives and attorneys, and the designation of the case and references to

53 Gołaczyński–Szostek (eds.) 2016. 207. The author also proposes that this provision be supplemented with the obligation to electronically transmit the content of an electronic document.

54 Kaczmarek-Templin 2012. 201.

the disclosure.[55] Moreover, it includes court decisions, orders, and actions of the parties. There is also a possibility to transcribe a specific part of the recording, which could be performed with the consent of the president of the court, at the request of the presiding judge. Therefore, the original version of the provisions did not allow for transcription only at the request of the judge. As a result of the experience from the practice of using e-minutes, the Code of Civil Procedure was amended by the Act of 29 August 2014, entered into force on 27 October 2014, which introduced the possibility of drawing up actions of the parties requiring signature on a separate document (e.g. court settlement) and extended the scope of the content of the abridged minutes (the written part of the minutes) to include the parties' requests and statements and a summary of the results of the evidentiary proceedings. Finally, the provisions stipulated that the transcription could be ordered by the presiding judge and not by the president of the court at the request of the presiding judge. The amendment to the Code of Civil Procedure of 10 July 2015 introduced the possibility of registering the course of an open hearing by the parties themselves, pursuant to Art. 162(1) of the CCP, and, finally, the amendment of 4 July 2019, which entered into force on 7 November 2019, introduced some rules relating to the status of the transcription of an oral justification.

The minutes of an open hearing have especially two parts (two forms). The first part is a recording (audio-video or audio only), and the second part is in writing. The colloquial term e-minutes can refer only to the first part, but also to both parts of the minutes (then the term e-minutes simply means minutes different than the traditional ones, i.e. only in written form). In each case, the minutes are drawn up by a recording clerk under the supervision of the presiding judge.

Currently, the recording part is not always prepared. Pursuant to Art. 157 § 2 of the CCP, if for technical reasons it is not possible to record the course of the hearing with a device recording sound or image and sound, the minutes are only prepared in writing. The reason for this may be a failure or lack of infrastructure in a given court (recording takes place using dedicated devices and software, so if they have not been delivered to the court, the recording part cannot be prepared).

If the course of the hearing is not recorded with the use of sound or image and sound recording equipment, the minutes drawn up in writing contain more elements – apart from the data and circumstances specified in Art. 158 § 1 of the CCP, they also include requests and statements of the parties, instructions given, and the results of the evidentiary proceedings and other circumstances important for the course of the hearing; instead of requests and statements, it is possible to refer in the minutes to preparatory pleadings. Some of these elements, pursuant to Art. 158 § 1^1 of the CCP, may, but do not have to, include written minutes even if the recording part is prepared.

55 Klich 2016b. 89; Goździaszek 2016. 28; Kaczmarek-Templin 2012. 287; Gołaczyński–Szostek (eds.) 2016. 187; Zalesińska 2016. 232; Uliasz 2019. 510 et seq.

In the Regulation of the Minister of Justice of 2 March 2015 on sound or image and sound recording of the course of an open hearing in civil proceedings (*Journal of Laws* of 2015, item 359, as amended), minutes drawn up using a sound or image and sound recording device are signed by the recording clerk with an electronic signature that guarantees the identification of the recording clerk and the recognition of any subsequent changes to the minutes.

The minutes prepared in writing are signed by the presiding judge and the recording clerk. It is also possible to order a transcription of the recording. Based on Art. 158 § 4 of the CCP, if it is necessary to ensure the proper adjudication in the case, the presiding judge may order a transcript of the relevant part of the minutes prepared with the use of a sound or image and sound recording device.

If there is a contradiction between the transcription and the recording of sound or image and sound, then, pursuant to Art. 160 of the CCP, it is possible to correct the transcription. However, there is no possibility to rectify the sound or image and sound recording itself.

Pursuant to Art. 9 of the CCP, the parties and participants in the proceedings have the right to view the case files and receive copies or extracts from these files. The content of the minutes and pleadings may also be made available in an electronic form via the ICT system supporting the court proceedings or another ICT system used to make these minutes or pleadings available. The parties and participants in the proceedings have the right to receive sound or image and sound recordings from the case files unless the protocol has been prepared only in writing. The presiding judge issues a sound recording from the case files if important public or private interests oppose the release of the image and sound recording.

If the hearing was held *in-camera*, the parties and participants in the proceedings have the right to receive only the audio recording from the case files.

In view of the need to protect privacy, initially there was no possibility for the parties to record the course of the hearing. However, currently, pursuant to Art. 9^1 § 1 of the CCP, the court's permission is not required for the parties or participants in the proceedings to record the course of the hearing and other court actions at which they are present with the use of a sound recording device. However, there are some limitations, namely: only sound can be recorded; and this applies to hearings and other court actions at which the recorders are present.

The parties and participants in the proceedings are required to inform the court of their intention to record the course of a hearing or other court action with the use of a sound recording device. However, on the basis of Art. 9^1 § 1–2 of the CCP, the court prohibits a party or participant in the proceedings from recording the course of a hearing or other court action with the use of a sound recording device if the hearing or part of it is held in-camera or for the sake of correctness of the proceedings.[56]

56 Gołaczyński–Flaga-Gieruszyńska–Woźniak 2021. 137 et seq.

7. E-judgments

The provision of Art. 324, section 4 of the CCP, as mentioned above, set forth that 'in proceedings initiated via the ICT system, the judgment may be recorded in the ICT system and provided with a qualified electronic signature'. This general provision will apply to payment orders [Art. 353(2) of the CCP], decisions (Art. 361 of the CCP), orders of the presiding judge (Art. 362 of the CCP), and decisions of the reporter – a court clerk with judicial attributions – [Art. 362(1) of the CCP]. An interesting solution is the possibility of providing an oral justification. However, this applies to a situation where the course of an open hearing was recorded using sound or image and sound recording devices (e-minutes) (Art. 157, section 1 of the CCP). However, before the oral justification is given, the presiding judge is obliged to inform the participants of the hearing about this form of justification. The consequence of giving the oral justification is the failure to provide the basic motives for the decision. If an oral justification is provided, a party may request a transcript of an oral justification, to which the provisions on a written justification apply accordingly [Art. 331(1) of the CCP].

In the electronic proceedings by writ of payment, the payment order is issued only in the ICT system. The party, when applying for the initiation of enforcement on the basis of an order issued in these proceedings, has to attach a printout from the ICT system to the application for initiation of enforcement, and the court bailiff is required to verify the existence of this title in the ICT system that supports the court proceedings (courts also have access to this system). The decision granting an enforcement clause to the orders referred to in Art. 777, sections 1 and 1(1) of the CCP issued in an electronic form is left only in the ICT system, except for the cases referred to in art-s 778(1), 778(2), 787, 787(1), 788, and 789 of the CCP. Such a decision is issued without writing a separate sentence, by placing an enforcement clause in the ICT system and affixing it with a qualified electronic signature of a judge or a reporter. Enforcement orders referred to in Art. 783, section 4 of the CPP are appended with an enforcement clause by the district court of general jurisdiction of the debtor (Art. 781, section 192 of the CCP). The existence and content of the electronic enforcement order is verified by a judge or a reporter in the ICT system in which this order has been recorded. Detailed issues were regulated in the Regulation of the Minister of Justice of 2016 on court actions related to granting an enforcement clause to electronic enforcement orders and the method of storing and using electronic enforcement orders. The decision granting the enforcement clause is served pursuant to Art. 131(1) of the CCP.

8. Conclusions

The informatization of civil proceedings covers examination proceedings, which provide for a general model of proceedings in the fields of: submitting pleadings, performing court actions, including delivery services, recording the course of an open hearing, electronic judgments, taking electronic evidence, and separate proceedings, e.g. electronic proceedings by writ of payment and electronic land and mortgage register proceedings and registration proceedings for entry in the National Court Register. It can be noted that the special provisions contain certain differences, which result from the specificity and purpose of particular proceedings, but nevertheless they duplicate the general model for the examination proceedings (the form of judgments, electronic delivery service, submitting pleadings). The provisions of the third book on enforcement proceedings – not discussed in this publication – also refer to the general provisions developed for the examination proceedings. Therefore, it can be concluded that the current regulations contain, with some exceptions, fairly consistent IT solutions in civil proceedings. It can only be postulated that these differences in separate proceedings should be gradually eliminated. It is also possible to consider introducing to the general provisions in the examination proceedings the 'takeover' of solutions provided for the time of the COVID-19 pandemic, in particular to amend Art. 151, section 2 of the CCP and shape a remote hearing similarly to Art. 15zzs(2) of the Coronavirus Act, or to leave the delivery service of court pleadings to professional representatives via the Information Portal of Common Courts.

References

BERUTOWICZ, W. 1972. *Postępowanie cywilne w zarysie*. Warsaw.

CIEŚLAK, S. 2016. Elektroniczne czynności sądowe – perspektywy rozwoju. In: *Informatyzacja postepowania cywilnego. Teoria i praktyka*. Warsaw.

DALKA, S. 1987. Opinia biegłego oraz opinia instytutu naukowego lub naukowo-badawczego w procesie cywilnym. *Nowe Prawo* 10.

ERECIŃSKI, T. 1985. *Z problematyki dowodu z dokumentów w sądowym postępowaniu cywilnym. Studia z prawa postępowania cywilnego. Księga pamiątkowa ku czci Z. Resicha*. Warsaw.

GOŁACZYŃSKI, J. 2016a. Elektroniczne biuro podawcze. In: *Informatyzacja postepowania cywilnego*. Warsaw.

2016b. Informatyzacja postępowania cywilnego po nowelizacji Kodeksu postępowania cywilnego z 7.7.2019 r. In: *E-sąd, E-finanse, E-praca.* Warsaw.

(ed.) 2020. *Informatyzacja ksiąg wieczystych i postępowania wieczystoksięgowego.* Warsaw.
(ed.) 2021. *Postępowanie cywilne w dobie pandemii COVID-19*. Warsaw.
GOŁACZYŃSKI, J.–FLAGA-GIERUSZYŃSKA, K.–WOŹNIAK, Z. (eds.). 2021. *Kodeks postępowania cywilnego: postępowanie zabezpieczające*.
GOŁACZYŃSKI, J.–KLICH, A. 2016. Informatyzacja ksiąg wieczystych. In: *Elektronizacja postępowania wieczystoksięgowego*. Warsaw 2016.
GOŁACZYŃSKI, J.–SZOSTEK, D. (eds.) 2016. *Informatyzacja postępowania cywilnego.* Warsaw.
2020. Epidemia może przyspieszyć informatyzację sądów. *Prawo.pl* 31.03.2020. https://www.prawo.pl/prawnicy-sady/informatyzacja-sadow-zdaniem-ekspertow-moze-byc-przyspieszona-w,499106.html (accessed on: 10.09.2021).
GOŹDZIASZEK, Ł. 2016. Zasada bezpośredniości i pisemności postępowania dowodowego. In: *Informatyzacja postępowania cywilnego*. Warsaw.
2021. Informatyzacja postępowania cywilnego. In: *Prawo nowych technologii*. Warszawa.
JAKUBECKI, A. (ed.) 2010. *Kodeks postepowania cywilnego. Komentarz*. Warsaw.
(ed.) 2017. *Kodeks postępowania cywilnego*, vol. 1. Warsaw.
JODŁOWSKI, J.–RESICH, Z.–LAPIERRE, J.–MISIUK-JODŁOWSKA, T.–WEITZ, K. 2009. *Postępowanie cywilne*. Warsaw.
KACZMAREK, B. 2008. Moc dowodowa dokumentu elektronicznego w postępowaniu cywilnym – polemika. *Monitor Prawniczy* 5.
KACZMAREK-TEMPLIN, B. 2012. *Dowód z dokumentu elektronicznego w procesie cywilnym*. Warsaw.
2013. *Dowód z dokumentu elektronicznego w procesie cywilnym*. Warsaw.
KLICH, A. 2014. Pojęcie wiadomości specjalnych w tzw. cywilnych procesach lekarskich. In: *Dowodzenie w procesach cywilnych, gospodarczych i administracyjnych*. Olsztyn.
2016a. *Dowód z opinii biegłego w sprawach cywilnych. Biegły lekarz*. Warsaw.
2016b. Możliwość wykorzystania protokołu elektronicznego. In: *Informatyzacja postępowania cywilnego*. Warsaw.
KNOPPEK, K. 1993. *Dokument w procesie cywilnym*. Poznań.
Ł. BŁASZCZAK et al. (eds.). 2021. *Dowody w postępowaniu cywilnym*. Warsaw.
LACH, A. 2004. *Dowody elektroniczne w procesie karnym*. Toruń.
LEŚNIAK, M. 2011. Powszechny dostęp do przeglądania księgi wieczystej prowadzonej w systemie informatycznym (nowej księgi wieczystej). *Prawo Mediów Elektronicznych* 1.
ŁĘTOWSKA, E. (ed.) 1989. *Dopuszczalność dowodu z taśmy magnetofonowych. Proces i prawo, Księga pamiątkowa ku czci J. Jodłowskiego*. Wrocław.

ŁUKOWSKI, W. 2020. Portalu Informacyjnego czar. *Rzeczpospolita* 23.04.2020. https://www.rp.pl/opinie-prawne/art8965701-wojciech-lukowski-portalu-informacyjnego-czar (accessed on: 09.05.2020).

MARSZAŁKOWSKA-KRZEŚ, E.–RUDKOWSKA-ZĄBCZYK, E. 2010. Dowód z dokumentu w świetlne projektowanych zmian Kodeksu cywilnego. *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci prof. E. Gniewka*. Warsaw.

RUDKOWSKA-ZĄBCZYK, E. 2010. Dowody w postępowaniu cywilnym. In: *Dowody w postępowaniu cywilnym*. Warsaw.

SIEDLECKI, W. 1981. Gloss to the Judgment of the Supreme Court of 9 December 1980. *OSPiKA* 7–8.

1987. *Postępowanie cywilne. Zarys wykładu*. Warsaw.

2004. *Siedlecki, Swieboda, Postępowanie cywilne. Zarys wykładu*. Warsaw.

STĘPIEŃ, J. 2001. Podpis elektroniczny, Nowa ustawa – nowe problemy. *Monitor Prawniczy* 23.

SZOSTEK, D.–ŚWIERCZYŃSKI, M. 2007. Moc dowodowa dokumentu elektronicznego w postępowaniu cywilnym. *Monitor Prawniczy* 17.

2009. Moc dowodowa dokumentu elektronicznego w postępowaniu cywilnym – odpowiedź na polemikę. *Monitor Prawniczy* 6.

ULIASZ, M. 2019. *Zasada jawności sądowego postępowania egzekucyjnego*. Warsaw.

ZALESIŃSKA, A. 2016. *Wpływ informatyzacji na założenia*. Warsaw.

*** https://prs.ms.gov.pl/ (accessed on: 10.10.2021).

*** Decision of the Supreme Court of 15 April 1982, III CRN 65/82, Lex No. 8414.

*** Judgment of the Supreme Court of 10 January 1975, II CR 752/74, Legalis.

*** Judgment of the Supreme Court of 9 December 1980, II URN 171/80, SP 1981, issue 7.

*** Judgment of the Supreme Court of 20 June 1984, II CR 197/84, OSNC 1985, issue 2–3.

*** Judgment of the Supreme Court of 25 September 1985, IV PR 200/85, OSNCP 1986, No. 5.

*** Resolution of the Supreme Court of 30 October 1985, IIICZP 59/86, OSN 1986, issue 9.

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A Case Study Discovering the Potential for Algorithmic Decision-Making on Setting GDPR Fines

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Abstract. Administrative fines for GDPR infringements are growing rapidly in number, yet companies are presented with an opaque process on how these fines are issued by the data protection authorities (DPAs). In particular, one principle described within the guidelines issued by the European Data Protection Board (EDPB) requires a case-by-case assessment, which is potentially offsetting the automation of administrative fines in the future. This paper is challenging this principle through algorithmic arguments. The suggested approach has its benefits in terms of scalability. Yet, this approach may well receive funded critics due to potential clashes with other principles.

Keywords: machine learning, algorithmic decision-making, legal data analysis

1. Introduction

1.1. General Remarks

No one would go on record saying that privacy cannot be monetized. To the same extent, there is a good chance no one would dare to say that GDPR infringements could not be translated into economic values. The mere fact that it is difficult, it does not mean that it is impossible. Greengard argues that it is certain, amid a litany of security breaches and breakdowns, from Equifax to Cambridge Analytica; there is a growing focus on data privacy.[1] Frischmann further denotes that GDPR, above all else, represents the ongoing battle between unfettered capitalism and human dignity and that the whole point of it is that it is not designed to be an efficient regulation for businesses.[2] Hence, in this paper, we discover the potential

1 Greengard 2018. 17.
2 Greengard 2018. 18.

of a more efficient framework for setting fines because of GDPR infringements. The paper provides an overview of the criteria applied to these infringements (Section 2), includes a discussion of the findings of a quantitative research project (Section 3), provides a discussion on these findings (Section 4), and closes with conclusions and directions for future work (Section 5).

1.2. Powers of Authorities

According to Article 58 of GDPR,[3] the powers vested in data protection authorities (DPAs) are more far-reaching than the issuance of fines: authorities can give warnings or issue reprimands,[4] may impose orders as corrective measures[5] and ultimately provide administrative fines depending on the circumstances of each individual case. This is endorsed within the guidelines released by the European Data Protection Board (EDPB).[6] The referenced guidelines highlight the importance of four principles, which should be considered at all times: 1) sanctions must be equivalent; 2) fines should be effective, proportionate, and dissuasive; 3) a case-by-case assessment is required; 4) the active participation of DPAs is indispensable.

2. Criteria Framework of Setting Sanctions

Authorities administer sanctions based on the objective evaluation of the facts. The procedure consists of three basic steps: assessment of the case, assessment of the infringement, and assessment of the fine. In the first step, the facts of the case are investigated by the DPA. The aim of this step is to understand and determine more precisely what has happened. The second step contains the establishing of an actual infringement of the provisions. The third step determines the level of the fine. This only applies if the corrective measure is an administrative fine. If warnings and reprimands are issued, there is no need for the DPA to follow up with step three. This conclusion is endorsed by the GDPR in Recital (148) and by the EDPB.[7]

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] L 119/1.

4 Warnings are issued if the intended processing operations are likely to infringe provisions; reprimands are issued in case of minor infringements.

5 See Article 58, para. 2 of the GDPR in detail.

6 Guidelines adopted on 3 October 2017, 17/EN, WP 253 (hereinafter referred to as: EDPB Guidelines).

7 EDPB Guidelines 2017. 9.

The focus of this research is put on the actions taken in the third step, since there is a high degree of arbitrariness within that. If the factual analysis has indicated that there was a conflict between the behaviour of the controller or processor and the legislative background, and the legal analysis provides proof of infringement deserving an administrative fine, the amount is calculated based on a list of factors. The detailed presentation of such factors is falling outside the scope of this paper. However, the argument is that there are no limitations in terms of what should be considered by the DPAs when deciding upon setting a sanction as long as these fit into the framework established by the principles. This flexibility is welcomed, as it leaves room for a comprehensive and holistic approach. It can also grant access to evaluate the business structure and financial statements of the companies.

3. Algorithmic Decision-Making

3.1. Data Collection and Preparation

To evaluate the trends of setting a fine, the workings of the Romanian DPA are studied. As the date of writing, the authority issued 71 fines since the effective date of the GDPR. The primary source for data collection is the GDPR Enforcement Tracker maintained by CMS law (www.enforcmenttacker.com). The selection criteria for constructing the dataset requires that any decision issued against private individuals or private associations must be eliminated. Two additional cases decided against public national companies cannot be part of the data due to lack of availability of further information. Thus, the dataset includes 48 decisions on the companies from various industries that have received an administrative fine from the authority. The full dataset is available in *Appendix 1*.

Through supervised machine learning, the algorithms will discover those variables that play a significant role in determining the administrative fine. This potentially provides more transparency and offers insights into the profile of companies that are more exposed to such legal risks. To the same extent, it can offer conclusions underlining total randomization and selective arbitration.

As a key action within data preparation, we develop additional attributes expressed as variables. These variables are tied to the business metrics of the companies. The attribute glossary is presented in *Table 1*. The reference year is 2020 in each case.

Table 1. *Attribute glossary*

Variable name	Variable type	Definition
Type	Factor	Type of infringement established against the company.
Industry	Factor	The industry in which the company operates.
Fine	Double	Amount of money paid as sanction by the company.
Turnover	Double	Total of sales invoiced in the reference year.
Net profit	Double	Difference between the gross profit obtained and the related corporate tax.
Debts	Double	Current liabilities of the company arising from past events and settlement that are expected to result in resource outflows.
Fixed assets	Double	Goods and valuables with a useful life longer than one year and not consumed on first use.
Current assets	Double	Values that participate in a single economic circuit, being held short-term.
Equity ownership	Double	Financial resources attracted from owners, as well as those made from profits earned.
Employees	Double	Average number of employees engaged in individual labour contracts paid by the company for a normal average working time over the reference year.
Seniority	Double	Number of years passed since the date of establishment of the company.
Dates	Double	Number of days between the enforcement date of the GDPR and the decision date of the DPA issuing the fine.

Using the dataset, we construct three different types of trained regression algorithms (models) in R programming language. The models deployed in the analysis are based on the techniques of regression tree,[8] random forest,[9] and linear regression.[10]

3.2. Deploying the Models

We develop the first model based on the classification and regression tree (CART) approach developed by Breiman et al.[11] The regression tree is yielding the results

8 Basic regression trees partition a dataset into smaller groups and then fit a simple model (constant) for each subgroup. For more information, see the R Programming Guide provided by the University of Cincinnati. *UC Business Analytics*. 2018.

9 Random forests are responsible for building a large collection of de-correlated regression trees. Usually these have a good predictive performance. *UC Business Analytics*. 2018.

10 Linear regression is a useful tool for predicting a quantitative response, and it is a widely used statistical learning method. *UC Business Analytics*. 2018.

11 Breiman et al. 1984.

illustrated in *Figure 1*. This figure explains that all cases go through the regression tree and proceed to the left if the variable Fixed assets for the company is lower than a certain value (5.4e + 6, which is €5,400,000) or proceed to the right if these are higher. Next, the left branch is further partitioned by the variable Dates. Those cases in which the decision have been issued after more than 547 days proceed to the left branch, and the rest of the cases to the right. Next, the cases are partitioned based on the variable Type. Two types of infringements are meant to place cases in the left branch: 'Insufficient cooperation with supervisory authority' and 'Insufficient fulfilment of data subject rights'. The other cases proceed to the right branch. This is further divided by the number of employees. If the company has more than 160 employees, cases proceed to the left branch, the others to the right branch. Finally, in companies with a higher number of employees, the branch is ultimately partitioned by the industry. In three outstanding industries, the cases proceed to the left branch: 'Finance, Insurance, and Consulting', 'Healthcare', and 'Industry and Commerce'.

The branches in the bottom row lead to terminal nodes or leaves that contain our predicted response value. The amount of fine received by companies that do not have significant fixed assets is higher compared to others. Another conclusion is that decisions issued closer to the effective date of the GDPR are also contributing to higher fines.

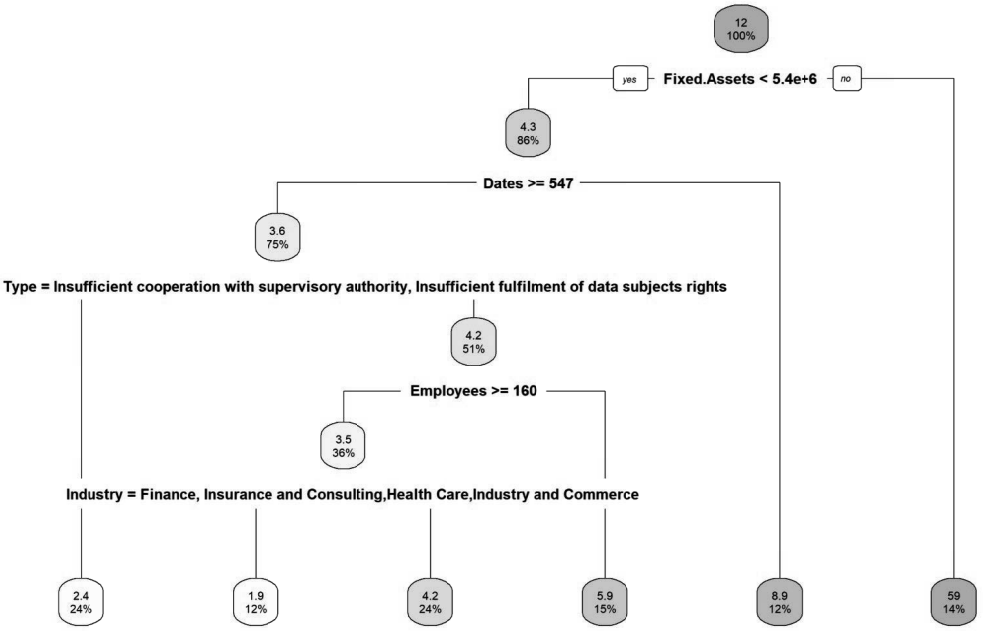

Figure 1. *Regression tree – Fine*

A substantial problem presents itself while using this method. A single regression tree has high variance that results in unstable predictions because different samples can drastically change the terminal nodes. This eventually translates into poor predictive accuracy. This doubt can also be confirmed by inspecting what is the importance level of each variable. This plot is presented in *Figure 2*.

Additionally, by relying on the bootstrap aggregating approach,[12] we fine-tune the model to reduce the variance. As a result, we have achieved a Root-Mean-Square Error (RMSE) value of 18.211, yet the accuracy value still remains low (38%), which cannot be declared useful for fine predictions. An explanation for this is the correlation between the regression trees.

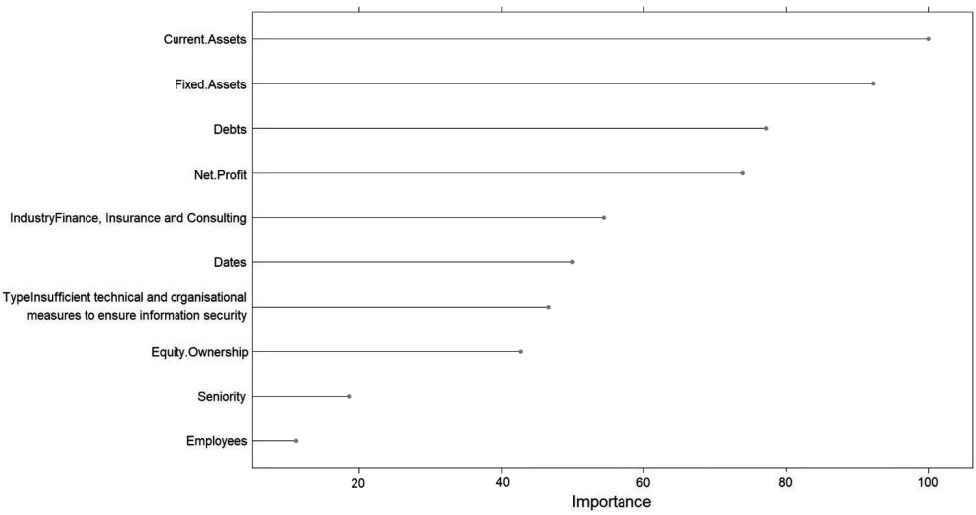

Figure 2. *Variable importance in regression tree (bootstrap aggregated) – Fine*

The second model uses random forest as a prediction algorithm. The advantage compared to the first method is that the latter uses multiple de-correlated regression trees, wherefore it requires less fine-tuning to provide instant predictions on numeric variables. As shown in *Figure 3*, the number of optimal trees to be used is 240. This model is yielding a 40% accuracy.

The third model deploys linear regression. To enhance predictive precision, we apply the Akaike Information Criterion (AIC) to select the most relevant variables, as provided by Bevans.[13] The interpretation provides that by eliminating the unnecessary variables and neglecting further training, the algorithm is working with 64% accuracy at a similar standard residual error level as the other two

12 Breiman 1996.
13 Bevans 2020.

models. The low p-value also confirms the correlation between the variables. The model, at this value, might be accepted for fine prediction.

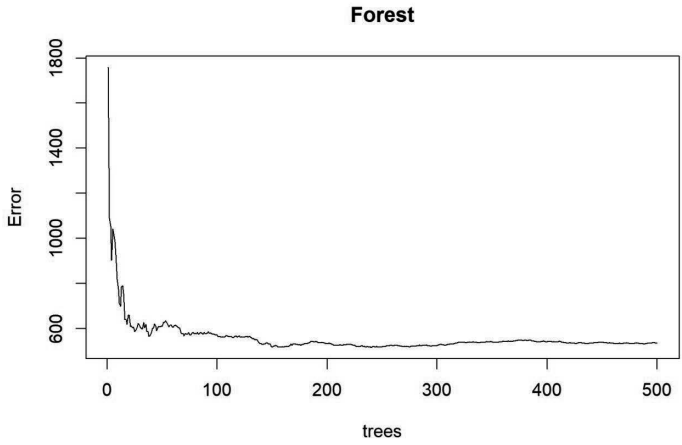

Figure 3. *Number of trees in the random forest – Fine*

For a better understanding, the effects of the variables used in the linear regression are also plotted in *Figure 4*. The reader may notice how these are affecting the amount of fine issued to companies. The turnover, fixed assets, and the number of days passed since the enforcement date of GDPR negatively impact the amount of fine. They contribute to lower amounts. The rest of the variables have adverse effects and contribute to higher fines.

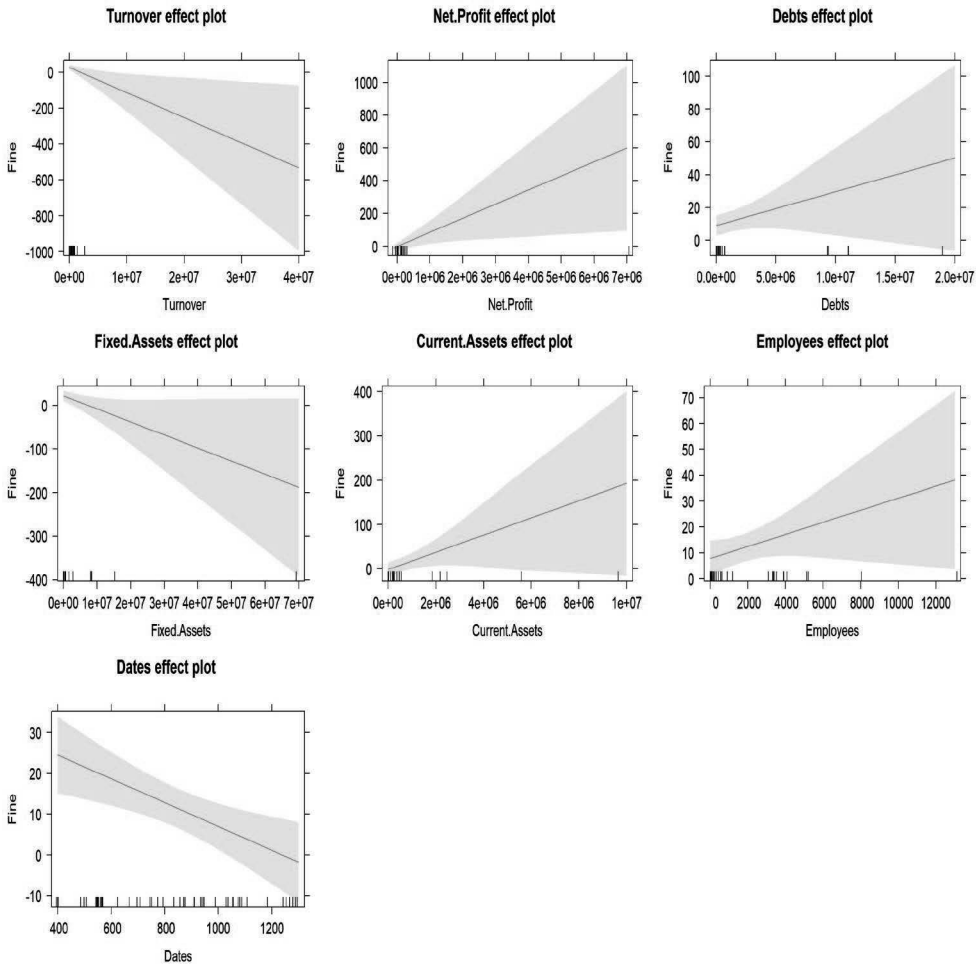

Figure 4. *Variable effects plot for linear regression – Fine*

4. Discussion

A few interesting remarks can be observed while inspecting the decisions issued by the Romanian DPA. The reader should consider that this authority is constantly on the podium of three most active supervisory authorities accounting for the total number of fines.[14]

First, the results of the study display that the authority applies the principle of equivalent sanctions in its literal meaning. This argument is underlined by the findings of eight individual cases, in which the type of infringement 'Insufficient

14 For more details, see: https://www.enforcementtracker.com/?insights.

cooperation with the supervisory authority' resulted in an identical amount of fine valued at €2,000. In a single case, the fine was valued at €3,000. The authority did not consider any other metrics that are part of the attribute glossary. At this point, the reader may wonder if the insufficient cooperation of a start-up with the supervisory authority should have the same consequences as in the case of a telecommunication giant.

Second, a similar emerging pattern is observed concerning 'Insufficient fulfilment of data subject rights' as an infringement type. Typically, the fines given for this infringement are valued between €2,000 and €4,000. The authority successfully ignores the industry, turnover number, net profits, number of employees, or the decision date.

Third, the structure of the dataset has demonstrated that the authority considers 'Insufficient technical and organizational measures to ensure information security' as the most important infringement type. This explains how and why multiple DPAs in the 'post-GDPR era' are becoming more focused on infringements of data security. The decisions for this infringement represent 65% of the dataset and 52% of the total number of decisions. There is also a significant variance between the cases in this type. However, outstandingly, the companies situated in the 'Finance, Insurance, and Consulting' industry bear the highest risk to significant amounts of administrative fines. Apart from this outlier, the other industries are equally exposed.

Forth, but not least, there is an emerging correlation between the number of days counted from the effective date of the GDPR and the date of decisions issued by the authority. Research results explain that the first thousand days (i.e. 3 years calculated from 25 May 2018) were critical for the companies. The biggest fines were given in the calendar period transposed from the lower bound of 395 days and the upper bound of 934 days. This falls in the period between June 2019 and December 2020. From January 2021 on, the companies have been witnessing a standardization procedure of fines. By applying this procedure, the authority seemingly prefers issuing a higher number to a higher amount of fines. Whether these fines are effective, proportionate, and dissuasive enough will be part of a more restricted and targeted legal analysis.

5. Conclusions

We conclude that the case study conducted on the decisions of the selected supervisory authority is useful. It provides valuable insights into the patterns resulted from data analysis. In its work, the authority generally meets the requirements of the principles. Yet, the general idea of this research is that there are valid grounds opposing the necessity of a case-by-case assessment. A

standardization of sanctions would guarantee more legal certainty and enhance internal work within the law enforcement agency, given the latter adopts such tool. The drawback is that by doing so, the authority would partially abandon its thorough application of the third principle. In reality, the trade-off for a possible automation of fines is not that severe. The attribute glossary already includes a certain amount of case assessment, and further attributes could enhance the accuracy rate of the predictions given by the models. All this would become gradually better with more cases being introduced into the dataset. Therefore, to oppose equivalent, effective, proportionate, and dissuasive sanctions while actively participating in the process, the authority does not need to focus on a case-by-case assessment. The practice of the last three years endorses this.

References

BEVANS, R. 2018. *Akaike Information Criterion | When & How to Use It*. https://www.scribbr.com/statistics/akaike-information-criterion/#:~:text=The%20Akaike%20information%20criterion%20(AIC,best%20fit%20for%20the%20data (accessed on: 05.01.2022).

BREIMAN, L. 1996. Bagging Predictors. *Machine Learning* 24: 123–140. https://doi.org/10.1023/A:1018054314350 (accessed on: 05.01.2022).

BREIMAN, L.–FRIEDMAN, J. H.–OLSHEN, R. A–STONE, C. J. 1984. *Classification and Regression Trees*. Monterey (California, USA).

GREENGARD, S. 2018. Weighing the Impact of GDPR. *Communications of the ACM* 61: 16–18.

UC Business Analytics R Programming Guide. 2018. www.uc-r.github.io/ (accessed on: 05.01.2022).

*** https://www.enforcementtracker.com/?insights (accessed on: 05.01.2022).

Appendix 1 – Dataset with the list of cases

Type	Industry	Fine	Turnover	Net Profit	Debts	Fixed Assets	Current Assets	Equity Ownership	Employees	Seniority	Dates
		amounts expressed in € thousand									
Insufficient legal basis for data processing	Healthcare	1.00	2.07	(0.89)	1.48	0	20.18	18.71	0	22	1,345
Insufficient fulfilment of data subjects' rights	Industry and Commerce	3.00	2,636,020.06	199,282.37	511,073.92	1,660,987.00	474,653.76	1,606,268.05	13,108	19	1,333
Non-compliance with general data processing principles	Media, Telecoms, and Broadcasting	6.00	601,063.71	30,574.53	281,328.52	479,687.13	262,188.75	419,680.20	3,399	25	1,288
Insufficient cooperation with supervisory authority	Industry and Commerce	2.00	56.66	(11.36)	34.25	27.65	2.38	(4.22)	3	5	1,295
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	2.00	8,800.01	1,000.28	954.86	463.88	1,928.57	1,197.09	556	16	1,278
Insufficient technical and organizational measures to ensure information security	Media, Telecoms, and Broadcasting	2.90	918,061.07	(43,968.77)	728,962.71	678,457.22	236,786.09	81,403.18	3,906	26	1,266
Insufficient technical and organizational measures to ensure information security	Transportation and Energy	5.00	788,579.46	298,101.49	219,218.97	2,861,411.67	555,700.39	2,983,335.03	3,354	22	1,253
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	1.00	195,411.90	2,253.47	100,300.65	111,127.30	24,353.00	33,611.92	1,190	17	1,253
Insufficient legal basis for data processing	Industry and Commerce	5.00	2,100.11	326.89	140.99	90.20	736.71	692.83	17	16	1,242
Insufficient technical and organizational measures to ensure information security	Healthcare	3.00	1,180.40	329.40	1,077.96	2,897.50	238.77	410.88	24	18	1,184
Insufficient cooperation with supervisory authority	Unknown	2.00	1,543.02	55.04	1,066.34	9.66	897.79	(158.85)	10	5	1,108

Type	Industry	Fine	Turnover	Net Profit	Debts	Fixed Assets	Current Assets	Equity Ownership	Employees	Seniority	Dates
		amounts expressed in € thousand									
Insufficient cooperation with supervisory authority	Unknown	2.00	0	(23.12)	233.21	0	49.41	(183.73)	3	4	1,108
Insufficient fulfilment of data subjects' rights	Media, Telecoms, and Broadcasting	2.00	601,063.71	30,574.53	281,328.52	479,687.13	262,188.75	419,680.20	3,399	25	1,081
Insufficient technical and organizational measures to ensure information security	Employment	2.00	20,425.59	(8,935.00)	25,090.27	26,006.19	1,835.69	(1,011.21)	340	18	1,075
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	1.50	57,079.51	472.38	12,904.50	315.00	14,964.93	1,482.78	4,081	21	1,057
Insufficient legal basis for data processing	Employment	5.00	22,218.54	2,253.28	6,269.99	10,098.10	5,696.39	9,612.71	436	29	1,053
Insufficient technical and organizational measures to ensure information security	Media, Telecoms and Broadcasting	10.00	438,096.63	(132,912.90)	175,302.34	147,465.03	209,501.63	169,776.68	915	23	1,037
Insufficient technical and organizational measures to ensure information security	Healthcare	2.00	24,535.26	(331.76)	9,786.21	3,933.52	7,463.34	21.73	627	19	1,030
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	1.00	10,269.66	12.21	4,432.00	998.25	4,239.91	789.99	167	15	946
Insufficient cooperation with supervisory authority	Industry and Commerce	2.00	2,457.72	11.55	4,631.81	1,682.72	2,480.63	0.32	29	3	939
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	5.00	20.57	0.96	41.93	19.64	24.42	5.43	1	6	911
Insufficient fulfilment of data subjects' rights	Media, Telecoms, and Broadcasting	4.00	918,061.07	(43,968.77)	728,962.71	678,457.22	236,786.09	81,403.18	3,906	26	910

Type	Industry	Fine	Turnover	Net Profit	Debts	Fixed Assets	Current Assets	Equity Ownership	Employees	Seniority	Dates
		amounts expressed in € thousand									
Insufficient cooperation with supervisory authority	Industry and Commerce	2.00	0	0	0	0	0	0	0	5	876
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	3.00	23,639.68	289.97	8,414.43	253.49	9,168.76	1,052.18	92	20	871
Insufficient cooperation with supervisory authority	Industry and Commerce	3.00	1,045.81	92.44	18.81	78.45	48.78	108.43	6	1	857
Insufficient technical and organizational measures to ensure information security	Media, Telecoms, and Broadcasting	2.00	1,298.33	362.00	444.83	263.52	600.69	422.06	16	14	834
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	15.00	41,697.14	2,032.37	7,210.79	4,356.72	12,061.51	9,233.04	152	16	773
Insufficient technical and organizational measures to ensure information security	Media, Telecoms, and Broadcasting	3.00	601,063.71	30,574.53	281,328.52	479,687.13	262,188.75	419,680.20	3,399	25	745
Insufficient technical and organizational measures to ensure information security	Transportation and Energy	4.00	594,221.23	28,291.00	90,823.09	13,663.89	190,630.71	111,182.39	250	15	752
Insufficient technical and organizational measures to ensure information security	Media, Telecoms, and Broadcasting	3.00	438,096.63	(132,912.90)	175,302.34	147,465.03	209,501.63	169,776.68	915	23	696
Insufficient legal basis for data processing	Industry and Commerce	3.00	14,015.40	985.42	3,616.46	2,515.71	7,078.86	5,894.83	172	27	696
Insufficient legal basis for data processing	Industry and Commerce	3.00	1,380,380.51	22,040.77	375,940.02	160,432.95	371,218.96	109,733.16	3,088	20	667
Insufficient technical and organizational measures to ensure information security	Media, Telecoms, and Broadcasting	4.15	918,061.07	(43,968.77)	728,962.71	678,457.22	236,786.09	81,403.18	3,906	26	667

Type	Industry	Fine	Turnover	Net Profit	Debts	Fixed Assets	Current Assets	Equity Ownership	Employees	Seniority	Dates
		amounts expressed in € thousand									
Insufficient technical and organizational measures to ensure information security	Transportation and Energy	3.00	594,221.23	28,291.00	90,823.09	13,663.89	190,630.71	111,182.39	250	15	667
Insufficient technical and organizational measures to ensure information security	Media, Telecoms, and Broadcasting	3.00	918,061.07	(43,968.77)	728,962.71	678,457.22	236,786.09	81,403.18	3,906	26	624
Non-compliance with general data processing principles	Employment	5.00	712.74	43.75	740.74	689.29	240.78	191.51	38	23	564
Insufficient legal basis for data processing	Transportation and Energy	6.00	594,221.23	28,291.00	90,823.09	13,663.89	190,630.71	111,182.39	250	15	567
Insufficient technical and organizational measures to ensure information security	Media, Telecoms, and Broadcasting	2.00	438,096.63	(132,912.90)	175,302.34	147,465.03	209,501.63	169,776.68	915	23	569
Insufficient cooperation with supervisory authority	Healthcare	2.00	0	(35.25)	84.27	0	37.91	(46.36)	5	4	553
Insufficient cooperation with supervisory authority	Industry and Commerce	3.00	70.48	33.73	11.53	4.16	3.08	(4.29)	4	7	547
Insufficient cooperation with supervisory authority	Industry and Commerce	2.00	0	0	0	0	0	0	0	5	567
Insufficient fulfilment of data subjects rights	Industry and Commerce	2.50	176.48	9.94	10.86	32.40	24.82	48.92	12	11	550
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	11.00	208,151.48	35,420.84	20,612.20	31,593.77	108,861.09	119,307.51	3,330	21	546
Insufficient legal basis for data processing	Media, Telecoms, and Broadcasting	9.00	776.99	134.99	273.30	332.61	440.93	362.23	15	9	486

Type	Industry	Fine	Turnover	Net Profit	Debts	Fixed Assets	Current Assets	Equity Ownership	Employees	Seniority	Dates
		amounts expressed in € thousand									
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	20.00	371.38	(39.25)	111.47	0.24	151.78	43.46	51	8	499
Insufficient fulfilment of information obligations	Employment	2.50	5,389.05	262.14	878.63	1,893.45	2,752.87	3,141.69	73	12	507
Insufficient technical and organizational measures to ensure information security	Industry and Commerce	3.00	9.08	2.67	28.86	18.04	14.59	6.91	0	4	403
Insufficient technical and organizational measures to ensure information security	Accommodation and Hospitality	15.00	7,577.88	(509.16)	56,707.00	17,812.06	12,006.04	(27,082.77)	171	31	400
Insufficient legal basis for data processing	Finance, Insurance, and Consulting	2.00	479,163.77	164,502.40	705,703.18	69,223,379.14	9,646,226.91	1,888,544.17	5,201	32	1087
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	1.00	690,163.80	105,087.53	11,082,894.70	8,245,935.57	1,853,784.45	1,208,304.51	3,523	28	989
Insufficient legal basis for data processing	Finance, Insurance, and Consulting	3.00	690,163.80	105,087.53	11,082,894.70	8,245,935.57	1,853,784.45	1,208,304.51	3,523	28	947
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	100.00	795,675.08	241,965.05	18,962,664.08	15,306,394.26	5,580,759.79	1,924,489.97	8,029	29	934
Insufficient fulfilment of data subjects rights	Finance, Insurance, and Consulting	2.00	4,820.06	5,372.08	0	87.05	29.02	0	97	12	794
Insufficient technical and organizational measures to ensure information security	Finance, Insurance and Consulting	5.00	479,163.77	164,502.40	705,703.18	69,223,379.14	9,646,226.91	1,888,544.17	5,201	32	708

Type	Industry	Fine	Turnover	Net Profit	Debts	Fixed Assets	Current Assets	Equity Ownership	Employees	Seniority	Dates
		amounts expressed in € thousand									
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	14.00	4,820.06	(352.25)	0	1.83	19.57	0	16	6	561
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	80.00	690,163.80	105,087.53	11,082,894.70	8,245,935.57	1,853,784.45	1,208,304.51	3,523	28	549
Insufficient fulfilment of data subjects rights	Finance, Insurance, and Consulting	2.00	44,275,000.00	7,067,000.00	0	100.00	50.00	,458,000.00	180	17	543
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	150.00	353,588.62	137,997.11	9,407,286.36	8,325,964.97	2,193,540.32	,112,218.94	5,115	24	499
Insufficient technical and organizational measures to ensure information security	Finance, Insurance, and Consulting	130.00	264,470.15	119,636.09	9,321,787.55	8,029,441.51	2,472,953.71	1,180,607.68	3363	31	395

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In Technology We Trust? The Present and Possible Future of Private Enforcement

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Abstract. In the course of this study, the author examines the current and possible future implementations of advanced information and communication technologies from the point of view of private enforcement (adjudication) and specifically the way in which they may contribute to reducing the time and resource requirements of the judiciary. Firstly, the major challenges of the current judiciary are presented, including the overbearing dogmatic approach to old principles of adjudication, resulting in a time-consuming, costly, labyrinthine, and unpredictable procedure, opening the way to private adjudication achieved via online platforms. In order for state adjudication to survive, modern technologies must be employed to achieve a data-based form of judicial process that is resource-efficient for the users of this 'service', while also guaranteeing a fair trial (albeit by electronic means). Such methods would include deployment of information and communication technology tools to aid court–party and party–party communication, using implementations of the blockchain to prevent evidence tampering, renouncing paper-based procedures, and embracing AI-assisted adjudication. Numerous examples of such solutions are provided, with some of their risks also emphasized such as the 'black box' phenomenon applicable to AI systems. The author concludes by stating that if private enforcement in the form of judiciary is to survive, it must become competitive with the dispute resolution options now being put forward by private actors.

Keywords: judiciary, new technologies, online dispute resolution platforms, online courts, blockchain, artificial intelligence

1. Introduction

Societal expectations of justice vary in space and time. Yet, looking back over the history of mankind, several constants emerge that have almost always been present in the way courts operate: to reach a just (i.e. non-arbitrary) decision, preferably as soon as possible. It is precisely the latter, the time factor, which

evolves with social and economic changes. Perhaps one of the best-known and most striking examples of the concept of time is that of the mediaeval cathedral builders, who began their work in the knowledge that they would never see the end of it, the finished building. From then on, one of the common effects of change is a shrinking sense of time.[1] As the time spent travelling, producing goods, and getting communication to its destination becomes ever shorter thanks to each invention, members of society become increasingly impatient.

This process has been given a new impetus by the Industrial Revolution of the 21st century, modelled on the Industrial Revolution of the 17th century. In the digital revolution of the early 21st century, the ever-smarter devices and services available have fundamentally redefined the concept of time: if a message sent to a smart device does not receive a reply within minutes, we are puzzled, whereas before the digital revolution, before the advent of e-mail, we were content to receive a reply to a letter sent by post in a week.

The state (the branches, subsystems, and service providers that carry out state functions) must recognize these changes, understand the reasons for them, and respond accordingly. This is also the case with the judiciary, perhaps the most complex and specific of all state functions. The initial question to be asked in this context is: what are the most important social and economic expectations of the judiciary in the first half of the 21st century, what should be preserved from the organizational and procedural principles that have been established over the past centuries, and how can its service character be enhanced?

The effects of the changed circumstances are clearly visible in the area of adjudication: for years now, fewer and fewer cases have been coming before the courts, while at the same time the number of ADR platforms and the number of disputes brought before them is growing at an accelerating pace. In our study, we seek to answer the 'whys' of this process, starting from the hypothesis that the judiciary as a public function has reached a crossroads: is it renewing itself, or is it becoming secondary to ADR platforms, steadily losing its importance? To this end, *Chapter I* outlines the current key features and shortcomings of private enforcement. In *Chapter II*, we will examine the information technology solutions already known from the point of view of which ones could already or in the near future substantially increase the efficiency of the administration of justice, reduce the duration of litigation, and adapt to the changed expectations and challenges. In *Chapter III*, we will outline where this process is in the country where the most rapid progress is being made in the shift from traditional to online courts:

1 Almost all disciplines deal with the concept of time, but here we only refer to Sören Kierkegaard's *Critique of Time*, published in 1845, in which the Danish philosopher distinguished between the actual passage of time (objective time) and its human perception (subjective time). The same duration may seem long to one person and short to another, taking into account their preconceived expectations of the event in question.

the Chinese experience is also useful for European countries. In the *Summary*, concrete proposals are made in the hope that they can serve as a starting point for further academic debate.

2. The Present of Private Enforcement

In this chapter, we could not attempt to describe all the procedural organizational models known in the 21st century, but we will highlight – without claiming completeness – the common features that can be found in the judicial systems of almost all developed countries. We concentrate primarily on the difficulties and problems which the developments in information technology presented in the next chapter may provide solutions to.

2.1. Judicial and Procedural Principles Have Become Dogma

These principles are contained and safeguarded by norms at the highest level of the legal hierarchy: international conventions, constitutions, and procedural laws. Thanks to the practice of regional courts and national constitutional courts, respect for these principles is so deeply rooted in legal thinking that the first question to be asked in the event of any change of organization or procedural model, or even of any amendment to legislation, is whether the new provision is compatible with and can be integrated into this system of principles and frameworks.[2] There is a lack of analyses of the systemic functioning of the judiciary that approach possible new procedural and organizational changes from the 'user's side', looking at how they serve the interests of legal entities and how much more 'attractive' it will be for them to use the judicial route.

2.2. The Courts are Cumbersome and Time-Consuming

The unconditional respect of the principles mentioned in the previous point necessarily results in the cumbersome and time-consuming nature of litigation and non-litigious procedures before the courts: if every single rule of guarantee must be respected in every single procedure, then, regardless of the specific dispute or substantive issue, only a protracted procedure can lead to a decision on the merits.

2 A good example of this is Act CXXX of 2016 on the Code of Civil Procedure, the ministerial explanatory memorandum of which states that the aim of the new Civil Procedure Code is to comply with international and national constitutional requirements. In the German-language legal literature in particular, the title of some sources already indicates whether certain changes related to information technology can be integrated into the current environment of fundamental principles – see, e.g., Paschke 2018.

Another specific feature of court proceedings is the fact that the service is linked to a place or building. The main purpose of the strict rules on jurisdiction and competence, which are linked to the right to a legal judge as one of the most important principles of justice, is to make it possible to determine which court has the power and the obligation to hear a particular dispute. If we add to all this the constitutional requirement for each judge to judge each case independently and impartially, we find a contradiction in the meaning of the right to a judge under the law: Does it matter whether one court or another is involved in the case? Are the judges in one court or another more independent? Can a different decision be expected here than there? From the parties' point of view, the question of the court to be seized is primarily reduced to the geographical distance, i.e. as close to them as possible, so that it becomes less and less of a problem to be in the courthouse in person and on time. The importance of this aspect diminishes if the proceedings are conducted partly or entirely online, in which case the rules on competence and jurisdiction are also partly irrelevant.

At this point, it is worth noting the question of the organization of the judiciary, which in most countries is held together almost exclusively by respect for historical tradition. Generally speaking, the smaller the geographical area of a country, the less fragmented its judicial organization.

2.3. New Competitors in the Justice Market

There is a clear tendency for large service providers and e-commerce companies to seek to provide efficient and quick solutions to disputes related to their services, primarily through dispute resolution procedures on their own platforms. These include eBay and Alibaba. These providers have quickly recognized that offering a fast and efficient solution to disputes over contracts on their websites can increase the number of visitors to their websites and the number of users of their services.[3] They were also helped by the fact that all the data on the contract was available and retrievable on the platform – when the contract was concluded, with what content, between whom – so that the parties did not have to spend time gathering evidence. One of the lessons learned from the development of the eBay platform was that the first version was simplified years later in a new development to reduce the number of questions and data that parties had to answer in order to start the procedure. This simplification has led to a surge in the number of claims, suggesting that the simpler the means of accessing an enforcement procedure, the more attractive and accessible it becomes to more parties.[4]

3 Katsh–Rabinovich-Einy 2017.
4 Katsh–Rabinovich-Einy 2017. 160.

The data on the success of these platforms leads to a number of conclusions, one of which is that parties need a concrete solution to their private legal dispute, not necessarily a court judgment.

2.4. Diverging Roles and Interests between the Legal Professions and between the Various Actors in the Process

The current model of civil litigation is, in a very simplified way, as follows: the judge's task is to decide the dispute, while the legal representative's (lawyer's) task is everything else: to fill in the party's lack of legal knowledge, to think through the possible outcome of the case, to consider the tactics, to collect and submit evidence, etc. During litigation, the judge also has different tasks in relation to the representation, which in the models of different countries varies from passive to active. Everywhere, the judge has a duty and a legal obligation to conclude the case within a reasonable time. It is interesting to note that there is no such requirement in relation to legal representation, at most a similar obligation can be derived from the requirement of good faith. The remuneration of the lawyer also works against a speedy conclusion, a connection which is also rich in legal literature.[5]

2.5. Difficulty in Planning the Duration. Difficulty in Predicting the Decision on the Merits

It is generally accepted in the field of criminal science that the greatest deterrent to committing/repeating a crime is exposure – the greater the proportion of offenders who fear being convicted, the more they will consider whether it is worth the risk. The same applies to temporality: the closer in time the offence and the punishment are, the greater the deterrent effect of the latter.

The situation is similar in civil disputes, especially in litigation regarding payment of debt, where the debtor knowingly and willingly does not pay but is only interested in stalling for time and in the disappearance of his assets on which the enforcement is based. If the civil proceedings are concluded as close as possible to the date of the debt's expiry, in a predictable manner and with a predictable outcome, this will at least force the debtor to reach an agreement. The timeliness and duration of civil proceedings is also of paramount importance and is directly proportional to the effectiveness of enforcement.[6]

The lack of uniform, predictable case law on a particular legal issue may also act as a deterrent to resorting to the courts. The development and implementation of uniform case law, which is a cornerstone of legal certainty,

5 Czoboly 2016. 758–776.

6 For a scholarly analysis of the temporality of civil proceedings, see Gáspárdy 1989.

is a task typically for national supreme courts, which have different means and methods for achieving this. What they have in common is that, as time goes on, more and more previous decisions and guidelines have to be kept in mind, their coherence maintained or revised because of changes in the law. In countries where precedent or quasi-precedent exists, it is a task beyond human capacity to cull the relevant judgments from tens of thousands of decisions, without precise methodology and technical assistance.

2.6. Paper-Based Lawsuits

In civil litigation, everything is done on paper, and the fact that communication (service) between the parties and the court is now largely done electronically has not changed this. Judges still have to read through towers of papers several metres high before preparing for a hearing or passing judgment. Since, with the exception of a few countries, a judge almost always has to hear several cases in parallel, the paper-based administration of justice is a major limitation on the efficiency of judicial work. At present, therefore, what and how the judge has noted from the information in the case file depends solely on his or her individual capacity to absorb and remember, which in itself makes the outcome of the case a matter of chance.

3. The Possible Future of Private Enforcement

Contemplating the future does not necessarily mean thinking about the difficult-to-predict distant future. Indeed, information technology, at its current stage of development, already offers solutions that could provide realistic help in overcoming or at least alleviating the difficulties outlined in the previous chapter. Although it is difficult to schedule each individual development – its implementation and realization depend on many factors – the following proposals could be implemented within this decade if there is professional consensus and political will. In other words, this chapter seeks to give a sense of what justice could look like in 2030 with the help of information technology.

3.1. Information Technology Is Not the Solution for Every Type of Problem or Case

At the outset of the consideration of each proposal, it should be noted that the IT solutions known today are not a solution for every type of problem or case. The key to digitalization is automation, i.e. information technology can only be used for cases and legal issues that can be well typified. It is worth noting here that in

the case of so-called complex disputes, there is a greater willingness on the part of the parties to settle, for which there are already several well-known and well-established platforms (Cybersettle, Inter-Settle, e-Settle, Click N'Settle, etc.).[7] The human factor, the human judge will therefore not disappear from civil litigation (certainly not until 2030), but his or her role and the knowledge required will change. However, this change is not radical, as the judge's role is already to transmit information during the trial. The parties provide information to the judge, which is transformed during a trial, and at the end of the proceedings a judgment is made, itself being a form of information. Judges have to learn how to structure this information into data that IT can evaluate.

3.2. The Data-Based Lawsuit

Most information technology solutions, and in particular the use of artificial intelligence, require data to be structured and given a legal interpretation. Currently, most of these systems involve the post-structuring of court judgments. For an AI to be able to assist in the delivery of a judgment, pleadings would need to be pre-coded in a similar way (the first step is to develop forms, which has already been done, e.g. for applications for an order for payment and for a statement of claim). This coding would seem to be easy to achieve in simpler types of actions, but it would fundamentally change the role and function of the judge in civil enforcement, as s/he would be responsible for structuring the parties' pleadings.

3.3. Using Blockchain Technology

The evidence phase is a central part of litigation. The availability of evidence, its transparency, and the examination of its origin are of decisive importance. At present, in the era of paper-based litigation, the question of how parties can present evidence and prove facts to the court months later in disputes where every element of the legal relationship has been conducted online is still unresolved. This can be helped by blockchain technology, which works through pre-written, immutable, tamper-proof software, where information (evidence) is downloaded to computers (legal representatives, court) operating on nodes in distributed networks. When a change is made to the database, it is checked by software running on all the computers in the network and then updated. This method excludes the possibility of evidence tampering.[8]

7 Ross 2021. 21–22.
8 Rosario 2021. 114–119.

3.4. Court Platforms – All in One Place

Perhaps the most visible, but certainly substantial, change from current enforcement would be for parties to have a well-designed, easy-to-use, and transparent platform to get answers to all their relevant questions and information, and for disputing parties to be able to contact each other through that platform. Such platforms already exist in a number of countries, and the experience has been positive. In the United States of America, researchers at the University of Michigan developed an online service called Matterhorn, which was first launched in 2017 in a Michigan district court and is now operating in more than 40 courts in 8 different states. The system was originally designed to help courts and citizens communicate more effectively with each other. It is available 24 hours a day via smartphone and is primarily used for small claims and family law disputes. The parties receive the court's decision through this platform. Another online court was launched in 2018 in Utah for disputes under $11,000. Through this platform, parties can attempt to reach a settlement without the involvement of the court or with the help of a case manager who will answer their basic legal questions and mediate to reach a settlement. The administrator will also assist in the submission of the necessary documents following an unsuccessful settlement attempt. If the parties so request, the administrator may decide without a hearing, on the basis of the documents submitted, or refer the case to a judge, who may order a hearing of the parties.[9]

According to Susskind, the best known and most advanced online dispute resolution system is currently in British Columbia, Canada, called the Civil Resolution Tribunal. Launched in mid-2016, the service is available for pecuniary disputes up to $5,000, and as of 2019 it is also available for claims involving traffic accidents up to $50,000. There are four parts to the service. The first will help users understand their legal situation, the second will seek to create an informal settlement between the parties. If this fails, an administrator steps in in the third part and tries to get the parties to reach an agreement. Finally, if this is unsuccessful, a member of the civil arbitration tribunal (who is not a judge) will issue a decision.[10]

It is important that this is not just an information site with templates describing different options but an intelligent and secure site where the parties can get a personalized response to their specific problem. It should also be ensured that settlements reached through this platform have the same two key features of the decision ending the procedure, i.e. a judgment and enforceability. It is clear from the examples mentioned that human involvement is essential in these platforms: court administrators or judges can be involved at a stage where this

9 Susskind 2019. 174–176.
10 Susskind 2019. 168–169.

may be justified. The development of such a platform would also bring about an important change of mindset, from courts waiting for parties to enter their premises to opening their doors and allowing anyone to deal with their court case from home using a smart device. It is also important to stress that this is unlikely to trigger a new influx of cases already in the courts, but rather new disputes that have so far been out of the courts' reach would be brought and resolved through the platforms, creating a new type of caseload for the courts.

It is worth noting that the design of such platforms is the subject of an almost independent research direction, legal design: thinking about and analysing how to create simpler, more efficient, and smarter interfaces for non-legal users, which will not discourage them from using the platform but will endear them to the legal subjects.[11]

3.5. The Effective Exercise and Extension of the Right to Justice

It is almost an axiom in the legal literature that the use of technology helps to ensure the right to justice.[12] This seems to be true even as other sources in the legal literature warn that any innovative solution must be guaranteed to be accessible to generations less open to information technology and to societies where Internet-based services themselves are not yet as widespread or as developed.[13]

At the same time, the meaning of the right to justice is necessarily expanding, precisely because of changing social and economic expectations: this fundamental right no longer means only the right to a judicial decision but also the right to fair administration, problem solving, and information. Still others distinguish between five components of the right to justice in dispute resolution using information technology tools in the online space: diagnosis, negotiation, mediation, interpretation of the law, and decision.[14]

3.6. Using Artificial Intelligence

Artificial intelligence taken in the general sense is the holy grail of information technology, and the expectations are much higher than what it can do now and in the near future. What it does well at the moment is that it can process much more data much faster than a human, and it never gets tired, its work is continuous. Artificial intelligence finds patterns and repetitions in the data series, a property that is also used for so-called predictive programs. It is also worth noting that the greatest development and competition in the field of artificial

11 Amsler–Martinez–Smith 2020.
12 Rainey–Bridgesmith 2021. 6.
13 Reiling 2020. 7–8.
14 For a summary of the different ideas, see Rainey–Bridgesmith 2021. 7.

intelligence is currently not in law but rather in the much more profitable fields of pharmaceutical, medical, and military research. Even here, however, these programs have not yet reached the level of general artificial intelligence, i.e. they do not yet have all the capabilities that the human brain has. It[15] follows that in the field of justice, artificial intelligence is unlikely to replace human intelligence in the foreseeable future. It is therefore worth concentrating on the areas where it can make a meaningful contribution to the work of the judiciary.[16]

The first of these is e-discovery, which can be used to identify and select from a large volume of documents the relevant data needed to resolve a dispute. It is already in use and is particularly useful for reviewing large volumes of e-mail correspondence and communications. The second is the so-called legal expert systems, whose development could be given a new impetus by the spread of chatbots, which are capable of structuring the information received into data in the form of question-and-answer sets. Finally, the best-known uses of AI are the so-called predictive models, which are based on the growing amount of partially structured legal information. They are mostly used in the field of criminal procedure law, among which the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) software, which has been used for years with public satisfaction by several courts in the United States of America, stands out.

In practice, the reception of COMPAS is a good example of the legal enforcement issues that can arise in the case of AI-based decision-making. There are currently more than 60 similar automated systems in the US, of which COMPAS is used in four states (New York, Wisconsin, California, Florida). It was developed and is operated by the private company Northpoint (now Equivant) and is used by state agencies (police, prosecutors, courts) for a subscription fee. The software works with public data on crime, which it processes together with the specific defendant's answers to a 137-question questionnaire to produce an estimate of the likelihood of re-offending. This program is used at the investigative stage to decide on the use of coercive measures (pre-trial detention or bail), at the level of the sentence and the decision on parole. The result of the COMPAS assessment is not binding on the prosecuting authority or court, but experience shows that when it is used, it is almost always used as a basis for a decision.

Following the program's enthusiastic reception, COMPAS has come in for increasing criticism. The most common of these is a problem known as the 'black box': the developer treats the exact specification of the software as a trade secret so that prosecutors have virtually no control over its operation. The software was designed to eliminate subjectivity and human error, but now the automated decision that replaces it is the focus of controversy. So far, the Wisconsin Supreme Court has addressed these issues in the most detailed way, in its 2016 ruling in

15 Tilesch–Hatamleh 2021. 19.

16 The following division is given by Katz 2021. 90–93.

State v. Loomis (Wisconsin v. Loomis, in which a motion for a writ of certiorari was rejected by the Supreme Court of the United States). The facts of the case were not extraordinary: Eric Loomis was charged with five felonies in connection with a car chase, two of which he pleaded guilty to and entered into a plea bargain. The court of first instance used the COMPAS analysis to determine the sentence, which showed that the risk of re-offending was very high and that the defendant posed a high risk to society. The court therefore imposed a maximum sentence of six years' imprisonment for the two offences.

Loomis appealed the decision to the Wisconsin Supreme Court, arguing, among other things, that his right to a fair trial was violated because he was not allowed to know how the software worked and thus could not verify the accuracy of the results. The latter, in his view, is also a concern because COMPAS works with group data, so the imposition of the penalty is not specific. The Supreme Court did not find the appeal to be well founded but ruled that the analysis carried out by COMPAS was only one of the possible criteria for determining the level of the penalty and could not become exclusive. It did not, however, respond to the arguments relating to the intelligibility of the functioning of the software. In the US, there has since been increasing pressure on the courts to uncover the 'black box'.

4. Experience of the Digitization of Chinese Courts

The first step in a comprehensive reform of the Chinese judiciary was the 'Transparent Justice' (*si fa gong kai*) project, launched in 2009, which involved the centralized creation of a countrywide public database of court judgments,[17] which was later complemented by three additional databases: court enforcement,[18] court proceedings information,[19] and court dockets.[20] The issue of justice has been taken to the highest political level, with the Central Committee of the Communist Party of China adopting a resolution in 2014 on 'some important issues related to the comprehensive promotion of the rule of law', aimed at improving the efficiency of access to justice. The details of the reform were set out in a five-year development plan adopted in 2016, which was summarily dubbed the Smart Courts. The large-scale digitization of courts and the trial runs of three Internet courts were launched.

The first court, which is exclusively online and accessible, was established in the country's e-commerce hub of Hangzhou in 2017 and the other two in Beijing and Guangzhou in 2018. Together, these three courts had resolved 1.2 million

17 https://wenshu.court.gov.cn.
18 https://zxgk.court.gov.cn.
19 https://splcgk.court.gov.cn/gzfwww/.
20 http://tingshen.court.gov.cn.

disputes by the end of 2019. The Hangzhou Internet Court has been empowered to hear six types of cases loosely related to the Internet that fall under the jurisdiction of the first instance courts of Hangzhou city: disputes over Internet purchases, services, consumer loans, and other contractual disputes; disputes over the ownership and infringement of Internet copyright; disputes over online personal rights infringements; product liability disputes arising from online purchases; domain name disputes; and administrative disputes over Internet-related regulations.[21]

In the design and testing of Internet courts, particular attention has also been paid to the integration of Internet technologies into traditional court procedures. At the Internet Court in Hangzhou, platform technology was used in the design of portals for online litigation, online mediation, electronic evidence storage, online document delivery, online enforcement, and online judgment publication. A novelty was the introduction of streaming technology, which reduces the physical and emotional distance between the judiciary and the parties by visualizing the trial (hearing). Finally, among the developments in Internet courts, the use of artificial intelligence and robotic technologies to facilitate automated decision-making should be mentioned.

Among the robotic technologies, robotic process automation is used, called virtual judges, who work non-stop, 24 hours a day, 7 days a week, five times more efficiently than manual judges. These process robots are able to mimic not only human decision-making processes but also the specific writing style of individual judges.

The experience of the first few years shows that the latest generation of online platforms, the Internet courts, are transforming the traditional role of lawyers. Judges are becoming more proactive actors in proceedings, performing a combination of functions such as conflict analysis, prevention, and resolution. Accordingly, judges act as controllers of procedural actions rather than as decision-makers. And parties are increasingly turning to the courts as a service centre for resolution rather than for judgement. Technological developments have outpaced the education of Chinese judges, with more and more training now being provided to help them properly interpret online data, use AI-based software, and improve their digital literacy. In addition to judges, lawyers also find that the use of new technologies is challenging their profession: as more and more automated systems are able to resolve specific disputes or propose settlements without the assistance of a legal professional, the services and expertise of lawyers are becoming less indispensable to the parties.

Thanks to data-intensive technological tools, the collection and analysis of data enables the judiciary not only to streamline and improve traditional dispute resolution procedures but also to identify why and how conflicts occur.

21 A detailed analysis of Chinese judicial reform is contained in Shu Shang–Wenli 2020. 119–148.

This process can lead to a transformation from a reactive approach to judicial proceedings, resolving individual claims, to a proactive dispute prevention function, also helping to improve the effectiveness of the legislative response.

In addition to the clear success of China's Internet courts, there are a number of outstanding issues, such as the lack of a uniform privacy regime for online platforms and the extent to which the private sector should be involved in costly developments. In any case, while in Europe these regulatory issues are still under consideration, in China, fast and efficient Internet courts based on online platforms, accessible anytime from desktop and mobile devices, without legal expertise, have already been implemented, adding a new dimension to the associations with Chinese justice.

5. Conclusions

State justice in developed countries is at a crossroads: either it adapts to the challenges of the digital revolution and becomes attractive and realistic, winning the competition against the online dispute resolution platforms of the big private providers, or it is relegated to the dustbin of legal history. The challenge is made more difficult by the fact that there is no end to the development of information technology, which means that some solutions that currently seem effective may well be obsolete in 5–10 years.

It is particularly difficult for lawyers who are attached to principles and predictability to accept that the model of law enforcement that has been in place for almost 200 years needs to be fundamentally rethought and that courts need to be allowed to innovate. Dogmas have to be rewritten, new issues and technological concepts that go beyond law have to be introduced and familiarized at the user level.

Much more attention needs to be paid to the changing needs and expectations of the client side, of society and the economy, with regard to the judiciary. The seemingly simplistic but real phenomenon that services that are not available on a smartphone do not exist for the growing generations must be recognized.

Despite all the theoretical and practical difficulties, the country whose lawyers and legislators are the first to recognize this and are able to provide appropriate answers to these difficult questions will have a serious competitive advantage over other countries. An efficient and predictable judicial system is also an important prerequisite for the functioning of the economy and for social peace.

References

AMSLER, L. B.–MARTINEZ, J.–SMITH, S. E. 2020. *Dispute System Design: Preventing, Managing and Resolving Conflict*. Stanford (USA).

CZOBOLY, G. 2016. The Protraction of Civil Lawsuits. In: *The State of the Hungarian Legal System*. Budapest.

GÁSPÁRDY, L. 1989. *The Time Dimension of Civil Proceedings*. Budapest.

KATSH, E.–RABINOVICH-EINY, O. 2017. *Digital Justice*. New York.

KATZ, D. M. 2021. AI + Law – An Overview. In: *Legal Informatics*. Cambridge.

PASCHKE, A. 2018. *Digitale Gerichtsöffentlichkeit – Informationstechnische Maßnahmen, rechtliche Grenzen und gesellschaftliche Aspekte der Öffentlichkeitsgewähr in der Justiz*. Berlin.

RAINEY, D.–BRIDGESMITH, L. 2021. Bits and Bytes and Apps – Oh My! Scary Things in the ODR Forest. *International Journal on Online Dispute Resolution* 1.

REILING, D. 2020. Courts and Artificial Intelligence. *International Journal for Court Administration* 2.

ROSARIO, N. M. 2021. Introduction to Blockchain and Cryptography. In: *Legal Informatics*. Cambridge.

ROSS, G. 2021. What's Good for ODR? AI or AI. *International Journal on Online Dispute Resolution* 1.

SHU SHANG, C.–GUO, W. 2020. Towards Online Dispute Resolution-Led Justice in China. *International Journal of Online Dispute Resolution* 2.

SUSSKIND, R. 2019. *Online Courts and the Future of Justice*. Oxford.

TILESCH, G.–HATAMLEH, O. 2021. *Art and Intelligence*. Budapest.

*** https://wenshu.court.gov.cn (accessed on: 18.10.2021).

*** https://zxgk.court.gov.cn (accessed on: 18.10.2021).

*** https://splcgk.court.gov.cn/gzfwww/ (accessed on: 18.10.2021).

*** http://tingshen.court.gov.cn (accessed on: 18.10.2021).

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Non-Litigious Proceedings under the Jurisdiction of the Court in Hungary

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Abstract. The author outlines in her study the main non-contentious (non-litigious) procedures under Hungarian law that are governed by special norms in conjunction with those of the Code of Civil Procedure and that now employ electronic means for submitting requests and documents, as well as for communication with the parties and service of procedure. The main procedures examined are those instituted by the new Hungarian Code of Civil Procedure itself and those pertinent to procedures before the Company Register, during insolvency procedures and during the registration of entities comprising non-governmental organizations and other manifestations of the civil society. The author concludes that the most significant non-litigious procedures now employ means of electronic communication.

Keywords: non-litigious procedure, electronic communication, Company Register, insolvency, bankruptcy, non-governmental organizations, Hungary

1. Introduction

The aim of this study is to explain the system of rules pertaining to non-litigious civil proceedings primarily based on electronic procedures under the jurisdiction of the courts.

Given the fact that most non-litigious proceedings examined in the study are regulated by separate laws but all refer to the Hungarian Code of Civil Procedure as the relevant background legislation, the author will first review the regulation of electronic communication in the Code of Civil Procedure. Then, in the subsequent sections, I will describe the role, function, and purpose of electronic devices in each non-litigation civil procedure.

2. Digital Technologies in the New Code of Civil Procedure

On 22 November 2016, the Hungarian National Assembly adopted Act CXXX of 2016 on the Code of Civil Procedure, which is applied in civil proceedings brought before the courts as of 1 January 2018. The major goal of the codification process during the creation of the new legislation was from the beginning to apply and use the possibilities of new technologies in order to ensure the effective, fast, and timely closure of civil procedures.[1]

Pursuant to the new code adopted by the Hungarian National Assembly as the prevailing legislation, the use and adoption of electronic technologies in civil procedures is jointly governed by Act CCXXII of 2015 on the general rules of electronic procedures and trust services (hereinafter referred to as the 'e-Procedure Act') and the Code of Civil Procedure. Government Decree 451/2016 should also be mentioned as the implementing regulation of the e-Procedure Act, which defines technically detailed provisions. The e-Procedure Act constitutes the legal framework for the applicability of electronic technologies and shall be considered governing in the issues not regulated under the Code of Civil Procedure.

The right to electronic procedures is defined by Section 8(1)[2] of the e-Procedure Act, which is further limited in legal proceedings by the right of choosing electronic communication as outlined in Section 605[3] of the Code of Civil Procedure. Parties are entitled to the right of choice regarding electronic communication if they act in person or through representatives not qualifying as legal representatives.

It is the e-Procedure Act that defines who is obliged to communicate electronically, and not the Code of Civil Procedure.[4] Bertold Baranyi identifies

1 *The Concept of the New Code of Civil Procedure Adopted by the Hungarian Government on 14 January 2015*. 18–19.

2 Section 8(1) of the e-Procedure Act: 'Lacking any provisions to the contrary in any law or government decree created through original legislative power, clients are entitled to execute their administrative tasks through electronic means and submit their declarations electronically towards an authority that provides for electronic communication.'

3 Section 605 of the Code of Civil Procedure with the marginal title Optional Communication Through Electronic Means: '(1) In civil procedures, the party not obliged to use electronic communication or its representative not qualified as a legal representative — except for the cases outlined in paragraph (5) — may submit any claims, other submissions and annexes thereto or documents (in this chapter furthermore referred to as "submissions") electronically as by their choice pursuant to the modes outlined in the e-Procedure Act and the implementation regulations thereof.'

4 Section 9(1) of the e-Procedure Act: 'Unless a law based on an internationally binding contractual obligation or an international contract defines provisions to the contrary, the following parties are obliged to apply electronic communication in cases pursuant to Section 2(1): a) party proceeding as a client, and is either aa) a business entity, ab) a state, ac) a local government, ad) a budgetary body, ae) a prosecutor, af) a notary, ag) public body, or ah) any other public administration authority not named under points ac)–ag), b) legal representatives of clients.'

three categories of obliged parties: 1. business entities; 2. public entities (including in particular the state, local governments, budgetary bodies, the prosecutor, notaries, public bodies, and other public administration authorities); 3. a client through legal representative.[5]

3. Electronic Company Procedures

Electronic company procedures were the first electronic court procedures in Hungary. Online administration was first made possible from September 2005, and then Act LXI of 2007 on the amendment of Act V of 2006 on public company information, company registration, and winding-up proceedings (Company Information Act) and other acts made it mandatory from 1 July 2008 to apply electronic procedures for company registration and the registration of changes in company information: from this date, requests for company registration and change registration are submitted electronically to the court of registration for all types of companies, and it is also possible to publish annual reports, query company information and submit applications for the conduct of statutory control procedures electronically.

The IT system for electronic company procedures is provided by the Company Information and Electronic Company Registration Service (Company Information Service). From an information technology perspective, clients communicate with the Company Information Service during electronic administrative procedures conducted at the court of registration.

The essence of electronic company procedures is that communication between the mandatory legal representative and the court of registration as well as the registration of company data are carried out electronically, which is a faster and less costly way compared to traditional paper-based procedures.

The content of the e-file to be sent to the court of registration consists mainly of digitized, i.e. scanned PDF format copies of paper documents (articles of association, power of attorney, declaration of use/acceptance of registered office, etc.) required for the company procedure. In addition to the documents prepared by the legal representative, the latter is also responsible for converting documents not prepared by it (e.g. a copy of the title deed, official licences, certificates of cash deposits from the payment service provider) into electronic form.

Applications for company registration (change registration) must be submitted electronically. An e-file is a complex data file containing all the documents to be sent to the court of registration in the course of the company procedure, which is signed by the legal representative with a qualified electronic signature.

5 Baranyi 2018. 2097–2098.

The application for company registration (change registration), together with the annexes, must be submitted to the competent commercial court determined according to the registered office of the company on the electronic form corresponding to the legal form of the company signed by the legal representative, in the manner specified in the Civil Code.

The key reason for the fact that the electronic procedures introduced later did not follow the model of the electronic company procedure is also the main weakness of the system, namely communication by e-mail.[6]

4. Insolvency Procedures

Under the current legislation in force in Hungary, debtors in payment difficulties have access to the following non-litigious civil procedures to restore their solvency.

Bankruptcy proceedings aim at restoring the solvency of economically distressed but still salvageable economic entities through the institutions of moratorium and the so-called reorganization programme in order to avoid the liquidation of the debtor entity.[7] Bankruptcy proceedings are insolvency procedures governed by Act XLIX of 1991 on bankruptcy and liquidation proceedings (Bankruptcy Act). They are non-litigious civil proceedings initiated by application to the court in which the debtor obtains a moratorium on payments and attempts to reach an arrangement agreement.

A *debt settlement procedure for natural persons* is a procedure enabling the settlement of debt for natural persons in payment difficulties. The aim of debt settlement procedures is to ensure that the debts of natural persons in payment difficulties are settled, and their solvency restored within a regulated framework using the necessary assets and income. The procedure must not be aimed at a definitive discharge of the debtor's payment obligations. Act CV of 2015 on the debt settlement of natural persons ('Debt Settlement Act') created the institution of *private bankruptcy* in Hungary, as envisaged by EU legal sources.[8]

On 21 May 2021, the National Assembly of Hungary adopted Act LXIV of 2021 on restructuring and amending certain acts for the purposes of legal

6 Szalai 2018. 48.

7 Nagy 2001. 186.

8 In this context, reference should be made to the *Entrepreneurship 2020 Action Plan Adopted on 9 January 2013* [COM(2012) 795 final, 09.01.2013], *Commission Recommendation 2014/135/EU on a new approach to business failure and insolvency* [COM(2014) 1500 final, 12.03.2014] and *Directive (EU) 2019/1023 of the European Parliament and of the Council (20 June 2019) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt and amending Directive (EU) 2017/1132* [OJ 172/18. 26.6.2019].

harmonization ('Restructuring Act') in order to establish compliance with Directive (EU) 2019/1023 of the European Parliament and of the Council (20 June 2019) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt and amending Directive (EU) 2017/1132 ('Restructuring and Insolvency Directive'). The new legislation is expected to lay down the civil material law and procedural rules for restructuring from 1 July 2022 and to introduce judicial non-litigious civil proceedings for restructuring as new non-litigious civil proceedings. The purpose of a restructuring procedure is to enable the debtor in the event of a probability of insolvency to decide on a restructuring plan in which it can agree with its creditors or all its creditors on a restructuring plan that will prevent the debtor's future insolvency or ensure its operability.

Liquidation proceedings are insolvency proceedings which are non-litigious proceedings under the jurisdiction of the court against an entity that is already in debt, with the purpose to distribute the assets of the entity to its creditors in a specified order by dissolving the entity as a legal entity without succession. In addition to bankruptcy, liquidation proceedings are insolvency proceedings governed by Act XLIX of 1991 on bankruptcy and winding-up proceedings ('Bankruptcy Act').

Although voluntary liquidation is not doctrinally considered an insolvency procedure, it does offer companies in payment difficulties the possibility in the context of *non-litigious civil proceedings within the jurisdiction of the court*[9] to satisfy their creditors through the dissolution of the non-insolvent entity without a legal successor. The basic rules of voluntary liquidation are laid down in Act V of 2006 on public company information, company registration, and winding-up proceedings ('Company Information Act'). There are three conditions for voluntary liquidation: i) the company must not be insolvent; ii) the (material) law applicable to the company must not contain any other provision; iii) the supreme body of the entity must decide to voluntarily liquidate the company without succession.

Of these procedures, bankruptcy and liquidation are the main procedures to be affected by dematerialization (digitalization).

9 Some authors question the nature of voluntary liquidation as a non-litigious civil proceeding within the jurisdiction of the court. In Judit Gál's view, voluntary liquidation is '[...] not a judicial or non-litigious procedure but [...] a special stage of a company's existence: a stage when its owners decide to terminate the company's activities permanently and without succession' (Gál 2006: 49). In my opinion, this statement can be disputed from two aspects: on the one hand, the decision of the supreme body of the entity alone is not sufficient for the voluntary liquidation to be carried out, as it requires the order of the commercial court declaring the opening of voluntary liquidation and its publication in the Official Gazette of Hungary; on the other hand, most of the procedures concerning the solvency and/or dissolution of entities are carried out at the request and with the active participation of the entity in the procedures (e.g. bankruptcy proceedings).

As of 1 January 2015, the Bankruptcy Act made electronic communication between courts and legal entities (parties) mandatory. Natural persons may submit applications and other official documents and may be served such documents on paper too. In bankruptcy proceedings, as well as in liquidation proceedings opened at the request of the debtor, creditor, or liquidator, legal representation is mandatory on the side of the applicant.

It is possible to switch to electronic means at any stage of the procedure.

5. NGO Registration Procedures

Act CLXXXI of 2011 on the court registration of COs ('civil society organizations')/ NGOs and the related procedural rules ('NGO Act') constitute the legal source of non-litigious procedures related to the registration of non-governmental organizations by the competent court (collectively referred to as registration procedures).

Registration procedures include the registration of NGOs and other organizations, the entry, amendment, and deletion of data, rights, and facts concerning the registered organization (registration procedure for changes), the erasure of organizations from the register (deregistration), the keeping of registers of NGOs and other organizations not qualifying as companies, and the provision of information on the data of these registers (data provision).

The NGO Act is not structured according to the separate regulations of individual non-litigious proceedings. The legislator first laid down general provisions on submissions, followed by rules on serving documents and other specific tasks of the court, and then continued by the rules summarized under the term 'other general rules' pertaining to the use of the information technology system and the evidential value of electronic documents.

The second chapter of the act declares the mandatory content of applications for the initiation of certain registration procedures with separate provisions for registration, registration of changes, and deregistration.

Chapter III, with the title *Rules of Non-Litigious Civil Proceedings Regulated by This Act*, summarizes most of the procedural provisions and is essentially an overview of court functions containing detailed rules on the formal and substantive examination of applications, the rejection of applications, simplified registration procedure, and deregistration. This chapter contains rules on the recording of the name, tax number, and statistical number of the organization in the register, on the registration of public benefit status and the removal thereof from the register, as well as on legal remedy proceedings.

Chapter IV of the NGO Act lays down special provisions for foundations, associations, and other organizations that do not qualify as NGOs, and in a

subchapter (Chapter IV/A) statutory control procedures are defined as separate non-litigious procedures.

Chapter V of the NGO Act sets out the primarily technical provisions for record keeping and managing the NGO register, which contains the background rules for the use of the IT system.

Chapter VI sets forth the provisions pertaining to data reporting, embodying the principle of publicity, while Chapter VII comprises a detailed list of the scope of data contained in the register of NGOs and other organizations not constituting a company.

As of 1 January 2015, electronic procedures also became mandatory for NGOs with regard to certain legal entities and for certain types of applications. Article 8 of the Civil Procedure Act specifies what organizations are obliged to maintain electronic communication. Private pension funds, voluntary mutual insurance funds, voluntary deposit guarantee and protection funds for credit institutions, public bodies, mutual insurance companies, viticulture communities, political parties, national sports federations, associations and public foundations are all obliged to use electronic procedures for court registration.

In addition, the submission may only be made electronically if:

a) the applicant is acting through a legal representative *or*

b) the applicant requests a simplified registration (change registration) procedure.

The application for public benefit status may only be submitted electronically, and the applicant may only file submissions in the procedure electronically. A public benefit organization may only file submissions electronically.

If the applicant is not required to use the electronic procedure, they may submit the application on paper but may also voluntarily choose to submit it electronically. If it chooses to submit its application electronically, it must communicate only by electronic means during the procedure.

The biggest advantage of the electronic procedure is the simplified registration procedure. The registration and registration of changes in associations, foundations, and sports associations under the Act on Sport can also be carried out in a simplified procedure from 1 January 2015. In principle, the procedure is similar to the simplified company procedure but differs significantly in practice.[10]

6. Summary

The study has examined in detail – without claiming to be exhaustive – the civil non-contentious proceedings of the courts that have based their rules on electronic procedures. It can be concluded that electronic communication is

10 Vándor 2018. 69.

becoming increasingly widespread not only in civil proceedings but also in non-contentious proceedings. Looking at the layers of legislation, it can be concluded that the e-Procedure Act is the basis for electronic procedures in both civil and non-civil litigation.

References

BARANYI, B. 2018. Az elektronikus technológiák és eszközök alkalmazása. In: *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja*. Budapest.

GÁL, J. 2006. A végelszámolásra vezető döntés. In: *A végelszámolási eljárás*. Budapest.

NAGY, A. 2001. A csődeljárás, a felszámolási eljárás és a végelszámolás. In: *Polgári nemperes eljárások*. Miskolc.

SZALAI, P. 2018. Az elektronikus cégeljárás. In: *Az elektronikus eljárások joga*. Budapest. http://real.mtak.hu/80535/1/e-elj%C3%A1r%C3%A1s-jog_Tank%C3%B6nyv_LO.pdf (accessed on: 01.10.2021).

VÁNDOR, C. 2018. Elektronikus kapcsolattartás és ügyintézés a civil szervezetek bejegyzése és változásbejelentése, valamint egyes nemperes eljárások területén. In: *Az elektronikus eljárások joga*. Budapest. http://real.mtak.hu/80535/1/e-elj%C3%A1r%C3%A1s-jog_Tank%C3%B6nyv_LO.pdf (accessed on: 01.10.2021).

*** *Commission Recommendation 2014/135/EU on a New Approach to Business Failure and Insolvency*. COM(2014) 1500 final. 12.03.2014. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0135&from=FR (accessed on: 01.10.2021).

*** *Directive (EU) 2019/1023 of the European Parliament and of the Council (20 June 2019) on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures concerning Restructuring, Insolvency and Discharge of Debt and Amending Directive (EU) 2017/1132*. OJ 172/18. 26.6.2019.

*** *Entrepreneurship 2020 Action Plan Adopted on 9 January 2013*. COM(2012) 795 final. 09.01.2013. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0795:FIN:en:PDF (accessed on: 01.10.2021).

*** *The Concept of the New Code of Civil Procedure Adopted by the Hungarian Government on 14 January 2015*. http://www.kormany.hu/download/f/ca/30000/20150128%20Az%20%C3%BAj%20polg%C3%A1ri%20perrendtart%C3%A1s%20koncepci%C3%B3ja.pdf (accessed on: 01.10.2021).

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Present and Future in the Digit(al)ization of Judicial Procedures in Romania in a European Context

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Abstract. In our study, we review some current trends in the digitalization of court activities, with an emphasis on Romania in a European Union context. We analyse the past and current state of the Romanian digitization and digitalization of courts, in the framework of major court activity types that may be digitized and digitalized. We also present the most recent attempts by the European Commission to facilitate the digital transition of court activities and the financing and normative aspects of this transition. Finally, we conclude by presenting proposed Romanian efforts to achieve the digital transition and some of their inadequacies.

Keywords: digitalization, digitization, digital transition, Romania, courts

1. Introductory Thoughts. What Constitutes 'New' Digit(al)ization?

The advances made in the digitization and digitalization of various systems, including public administration or public services, are widely considered as a marker of not just a technological progress but also of an institutional development. This is certainly the case of the justice system, where progress in the information and communication technology (ICT) sector is perpetually expected to herald revolutionary and yet unachieved results.

Digitization may be widely defined[1] as the digital representation of real-world objects or processes achieved by the use of computer systems. This is not to be confused[2] with *digitalization*, which is taken to mean the widescale deployment of ICT tools in order to affect transformation of the operation and to increase the

1 See Gonzalez-Diaz–Stelldinger–Latecki 2020.
2 Bloomberg 2018.

efficiency of pre-existing institutions and processes. Regardless of the definition, both could play an important role in increasing the efficiency of services, including public sector services, such as courts, and bodies of administrative jurisdiction (found in the field of taxation, public acquisitions, etc.). Our study will focus on the trends and the (as yet relatively meagre) results in this field.

We would like to point out here that – as has been stated in the literature[3] on digitization (a conclusion also valid for the wider notion of digitalization) – this is not merely the deployment of digital technology (ICT) but also a process by which the disruptive effects of this technology are fully embraced and put to use in order to generate interactive services instead of traditionally static ones and to achieve a 'co-creation' model for generating value.

Therefore, both digitization and digitalization must, by definition, yield disruptive results, as they must also produce added value. In consequence, simple applications for achieving some tasks in a digital environment that could be, and also were, achieved earlier in a similar way in a non-digital environment (such as service of procedure or confirmation of receipt in the field of judicial procedures) cannot be qualified as 'new' digitization or digitalization.

In our study, we shall review what truly qualifies as 'new' digitization and digitalization in the judicial sector and what progress Romania has made in this field in comparison with other states in the EU. We shall also examine Romanian, and to a lesser extent EU, efforts of court digitization and digitalization to determine if there is a mismatch between what is desired from these processes when implemented ideally and what may actually be achieved by them. We shall also examine whether digitization and digitalization are truly being achieved and whether poor governance and an underdeveloped legal framework have contributed to the obvious lack of progress in this field in Romania.

2. Digit(al)ization of Courts: Classifying the Solutions

According to Velicogna,[4] certain distinct categories of court digitization and digitalization employed in the EU may be identified, using a classification based on their utility to the judge and the court in general. The following part of our paper shows the conceptual framework developed by this author, which we consider the best way of viewing new technologies in courts in general. This classification is also compatible with and near identical to the one used[5] by the European Commission for the Efficiency of Justice (CEPEJ).

3 Schmidt–Zimmermann–Möhring–Nurcan–Keller–Bär 2016.
4 Velicogna 2007. 129–147.
5 European Commission for the Efficiency of Justice 2016 [henceforth cited as: CEPEJ 2016]. 15–41.

Basic technologies within the court according to the cited author are those off-the-shelf products (both hardware and software) which are utilized for the automation of basic 'office tasks' by the courts. These technologies (such as desktop and laptop computers, printers, scanners, local networks and Internet access, e-mail, word processors, web browsers, and other such applications) presuppose no customization of the ICT infrastructure to specifically suit court work and are considered useful mainly in constituting an 'installed base'.[6] Therefore, their implementation will result in increases of non-specific productivity and will also raise the level of technology-awareness in the workforce (including clerks and judges), resulting in the better uptake of future technologies. Finally, for these simple technologies to be usefully deployed, an infrastructure must be put in place, on which more customized solutions may be based in the future.

Technologies for the administrative component of court work include those that facilitate the action of the court registry, clerks, and other administrative personnel but also the case administration activity of the judges. These technologies include digital registration systems for recording case progress, administrative details, such as dates set for hearings and actions which took place regarding the case, but also means for digitizing documents, including scanners, specific optical character recognition (OCR) software, and data storage options. This set of ICT tools allows the court administration to aggregate case information in one place and to provide the necessary information to court personnel and to interested parties. This set of technologies also includes digital registration and case management software (CMS) by which the assignment of cases to certain judges, the record of the case details, and management tasks related to cases may be stored in a unitary fashion. Such technologies may be deployed in parallel with (as is most often the case) or in place of paper-based solutions for case management. CMS solutions are not only apt to ensure individual case management but may also be implemented at a court administration level to track caseloads on judges, the efficiency of courts, and other statistical information (case duration, types of cases, individual performance by judges, observance of time limits imposed on the judiciary, etc.). Such systems are also used for managing non-litigious case types, which do not presuppose judicial intervention in the proper sense.

Technologies for supporting judges are 'individual tools'[7] in support of judicial activity at a given court, as distinct entities from the organizational tools that are used at a court level. These are used to facilitate daily, specifically judicial activity by making possible the retrieval of case-specific information such as documents, applicable law and case law, information retrieval from previous trials, etc. Tools for sharing case-law-related inquiries among judges and among judicial bodies

6 Velicogna 2007. 131. The author references earlier work by others for this designation. See note 14 on the cited page.

7 Velicogna 2007. 136.

(such as online forums of judges) are also included in this category, as well as the individual electronic signatures attributed to judges, for compiling and signing electronic documents. Finally, application to support the drafting of judicial decisions (e.g. individual sentencing applications that propose a sentence based on several factors recorded in national databases, which are considered regarding the person of an offender), including artificial intelligence (AI) implementation, would also be considered inside this class of tools.

ICT facilitating communication exchange between courts, parties, and the general public as a category contains networked technologies that ensure court-related information transfer. These may be included in two subcategories. *Systems for electronic case and legal information provision* usually permit interested or even third parties to access case-related information such as trial dates and case progress. They are highly reliant on the standard information transfer infrastructure of the Internet and are constituted by court websites containing general interest and even case-related information. Legal databases, as well as informal communication platforms (for professional social networking, and information sharing such as online forums) are also included in this category. *Official electronic communication systems*, on the other hand, are highly secure, usually state-administered platforms accessible to court personnel, judges, parties and their representatives, or other professionals, which permit the online submission of documents to the court, send and receive other official communications, and make online proceedings possible (both in text-based and in audio-visual forms). Such official communication platforms are at the core of current e-justice programs throughout the EU. Small claims procedures are perhaps the most widely known of their implementations, as these procedures mainly aim for the digitalization of simplified (summary) procedures, and only more rarely for the digitalization of regular proceedings. Online platforms for (regular) judicial proceedings are also included within this category.

We would like to underline here an important distinction between websites, used in the general sense, which offer mainly one-way communication and information transfer from courts to interested or third parties, and portals. Portals which themselves are also accessible via the Internet, however, allow for information exchange and usually constitute the user interface of official electronic communication systems.

Finally, in addition to the classification by Velicogna, the European Commission for the Efficiency of Justice listed – in relation to the digitalization of court activities and the digitization of information related to these activities – the *legal framework* in which these processes take place, as a factor in the success (or failure) of such initiatives.

3. An Overview of the Digit(al)ization of Justice in Romania as Compared to Other EU Member States

The digitalization of justice in several EU jurisdictions has been of great interest not only to the EU, which in several initiatives aimed to stimulate such developments (one such initiative will be discussed in more detail below), but also to the European Commission for the Efficiency of Justice, which has published a special thematic report on this topic in the CEPEJ Studies series (no. 24), under the title *European Judicial Systems – Efficiency and Quality of Justice – Thematic Report: Use of Information Technology in European Courts*.

In the report, the CEPEJ aimed to develop a unitary frame of reference of indices and methods[8] in order to compare several judicial systems based on identical criteria, to determine the level to which ICT is deployed to serve the judiciary. The report scored participating countries' 'Global IT development level' based on the available equipment, the legal framework of ICT deployment in courts, and on the practices of governance applied to that deployment. Therefore, the 2016 CEPEJ report emphasized not only the technological (ICT) aspects of the digit(al)-ization of court activity but also the legal and governance framework developed for their implementation.

Romania[9] was one of the states that responded for data requests for compiling the report. It scored a total of two points for available equipment, two points for the legal framework, and a single point for governance, placing it in the mid-to-back of the ranked states and entities.[10]

The report remarked that in the relevant survey period Romania was the only country not yet to acquire ICT tools for collective court document storage, sharing and version management, and that it was one of only three EU Member States not to employ specialized personnel for this task.[11] It has been ascertained that Romania did deploy ICT tools to assist judges in drafting decisions in civil, administrative, and criminal cases, even though this technology was not equally available in all forms and for all case types (templates for decision writing, centralized case law databases, and intranet access being available, while advanced automation tools for drafting judicial decisions, voice dictation equipment, centralized legislative databases, a centralized record of all criminal cases, centralized databases for decision support and online training were found lacking).[12] A centralized electronic criminal records database does exist in Romania, but it only lists individuals' convictions, not criminal cases.[13]

8 CEPEJ 2016. 11–47.
9 For all data on which the report was based, displayed in a single-table format, see: CEPEJ 2016. 69.
10 CEPEJ 2016. 14.
11 CEPEJ 2016. 17, 70–72.
12 CEPEJ 2016. 70–72.
13 CEPEJ 2016. 19.

Romania was reported as having 100% of the necessary equipment rate for communication between courts and lawyers.[14] We would like to add here that the equipment rate does not equate to effective communication and only measures the hardware requirements for courts to undertake such communication. Also, the report notes that four EU Member States [Belgium, Greece, Romania, and the UK (Northern Ireland)] – although benefiting from high equipment rates – only employ this communication to one of the total of four stages of court proceeding, identified as being the commencement of proceedings, the pre-hearing phase of proceedings, referral management and hearing schedules, and, finally, the notification (service) of court decisions.[15] Although the report does not state this, we would like to indicate that Romania used ICT tools during the survey period only for the random referral of cases to judges by employing the ECRIS case management system (see below). It was also found that Romanian courts did have an electronic CMS system, statistical tools, the possibility to conduct videoconferencing, and the necessary material support but lacked direct electronic access to the land registries, the business registries, and other such systems, as well as effective workload monitoring.[16] In the case of videoconferencing, no special framework existed for conducting such communication even though videoconferencing was possible during the hearings.[17] We would like to add here that although videoconferencing is possible during a hearing, this, in the pre-COVID-19 circumstances of the survey, was limited to criminal cases, especially in the context of the hearing of detained persons, minors, other vulnerable persons, or witnesses with a protected location or identity according to the provisions of the relevant article of the Code of Criminal Procedure.

Romania was found not to have (fully) deployed technology for measuring the workload of individual judges, prosecutors, and court clerks [other EU members in this category at the survey date being Cyprus, Ireland, Slovakia, Sweden, and the United Kingdom (England and Wales)].[18]

The report noted that although technical prerequisites for communication between courts and lawyers existed in Romania, it is one of only four EU Member States participating in the survey (the other three being Latvia, Luxembourg, and Sweden) that had no legal framework governing this specific type of communication.[19] In fact, apart from data protection, Romania was found not to have any single structure in charge of the strategic governance of ICT applications in courts, no primary selected model for conducting ICT projects, no means of detecting any innovation from court initiatives, not any way to effectively measure

14 CEPEJ 2016. 35.
15 CEPEJ 2016. 36.
16 CEPEJ 2016. 73, 75.
17 CEPEJ 2016. 80.
18 CEPEJ 2016. 25, 70.
19 CEPEJ 2016. 43.

the benefits resulting from ICT deployment, and no global security policy to deal with potential threats to the ICT infrastructure and information.[20]

The report found that: there was a website gathering national information at both the local and the national level; electronic case submission and online monitoring of case progress were possible, as well as electronic communication between courts and lawyers; electronic signatures were implemented; online processing of specialized litigation was possible (although in reality this is not the case), as well as videoconferencing and the recording of court hearings and debates; granting legal aid and e-summoning (electronic court summons) were not possible; formalized electronic communication between the courts and enforcement agents, public notaries, judicial experts, and judicial police services did not exist, there being no possibility to broadcast video of judicial hearings and no legal framework for the publication of such materials.[21] Also, although communication between courts and lawyers was possible, it took the form of standard e-mail, no special system being used, and this communication was not governed by any special norms.[22]

The report also points out that Romania (along with only Italy from the surveyed EU Member States) requires that electronically submitted court applications also be submitted on paper, and, although having a procedure for electronically signing court documents, it still requires a paper hardcopy signed by hand (the only such country from among the surveyed EU Member States).[23]

Still, the report found that the clearance rate of cases (in civil and commercial litigation) is not strongly correlated with a high degree of ICT development, as Romania showed a case clearance rate of 107.8% on a yearly basis, being one of the highest scoring countries in the survey. The overall insufficient development of ICT in courts did constitute a factor preventing further improvement of the clearance rate.[24]

In summary, Romania was considered as being in the ongoing development stage (the second of three stages) in court digit(al)ization in the category of available equipment and necessary legislative framework but only in the early development stage (the first of three stages) in what concerns governance of the technological transition and deployment.[25]

The report painted a picture of disproportional, lopsided technological development, with sufficient equipment but no effective assistance to judges (even regional partners such as Poland, the Czech Republic, Slovakia, and Bulgaria achieving higher scores), no unified strategic approach, lack of

20 CEPEJ 2016. 81.
21 CEPEJ 2016. 76–78.
22 CEPEJ 2016. 79.
23 CEPEJ 2016. 48–49.
24 CEPEJ 2016. 55, 57, 59.
25 CEPEJ 2016. 46.

governance and of ICT implementation of court-to-party, court-to-lawyer, and court-to-frequent-user (enforcement agents, judicial police, etc.) official communications (Romania scoring below average in this category, along with France and Bulgaria). Also, an increased reliance on paper-based communications was ascertained, with no e-summons or e-submission procedures (outside of regular e-mail) being made available.

Summarizing the conclusions of the 2016 CEPEJ report, based on the classification of ICT technologies in courts developed by Velicogna, we may state that Romania was found to have implemented basic technologies within courts to a high degree. Technologies for the administrative component of the court (namely the ECRIS system) were also developed and put in place, with case assignment and wider case management being facilitated by this system. Technologies for supporting judges were found to be less developed, especially when it comes to aids in accessing legal information and in drafting decisions. Finally, ICT facilitating communication exchange between courts, parties, frequent users of court communications, and the general public was found to be insufficiently developed, some court information being accessible, however specific communication methods still being found lacking. On a related note, which is not part of the above classification but strongly related to it, the report found the regulatory and governance framework for new technologies in courts to be next to non-existent.

This state of affairs begs the question: is it possible to achieve transformative, 'disruptive' results by the implementation of new technologies in courts if this takes place asymmetrically? The answer to this question must be deferred; however, the problem posed must be kept in mind.

4. An Overview of the Particularities of Digital Transition of Romanian Courts and Its Perceived Problems

The CEPEJ report analysed above is able to offer a 'bird's eye view' of the ongoing digital transition in Romanian courts; however, some issues of this process can only be made known by an analysis of the particularities of this transition.

Primarily, we must note that the digital transition of Romanian courts has been on the agenda for some time now; however, it has not been considered a national priority or strongly advocated by civil society or interest groups within the judiciary before the COVID-19 pandemic. Therefore, this process presents a dual structure, visibly dividing pre-COVID-19 and post-COVID-19 efforts for digit(al)ization.

During the pre-COVID-19 period, efforts were largely concentrated on the development of a unified court CMS in order to increase court 'productivity', that is, in order to improve the courts' case clearance rates and also to affect the random allocation of cases to judges, thereby reducing the risk of corruption. A secondary purpose for the development of a CMS system was to provide statistical information about court activity and to serve as the source for publicly available case information (such as trial dates, excerpts of judicial decisions, etc.) to an online Portal of Romanian Courts (http://portal.just.ro) set up to increase the transparency of the judicial process.[26]

The implemented CMS, known as the ECRIS system, achieved a unitary platform for case number allocation, random case assignment, centralized storage of court documents (including scanned submissions to the courts and written evidence), with the possibility of aggregating court statistics, and, more importantly, case law, thereby indirectly informing case law databases. It also constituted a unified infrastructure for storing audio recordings of court hearings, and it also successfully provides the necessary data on ongoing cases to the online Portal of Romanian Courts.[27]

One of the major shortcomings of this CMS system is its being accessible only to court staff, and therefore it cannot serve as a shared platform for clients, lawyers, or other frequent court users, as the CEPEJ 2016 report has correctly ascertained. This CMS system, although containing the scanned contents of most court documents (including documentary evidence and judgements), does not itself permit outside access to them, leading to a patchwork of solutions to make scanned documentary evidence available online to the parties and to collect, collate, and anonymize judgements for publication. The ECRIS CMS system also does not permit direct document submission from outside sources.

To remedy these shortcomings, two notable platforms were developed for making scanned court documents available to the clients online and to facilitate online document submission. The older one is a platform called 'Info Dosar'[28] ('Casefile info') pioneered by the Cluj-Napoca Court of Appeal. It is in effect a database accessible by a fixed password communicated to the parties and permits online access to the scanned contents of the casefile. It also allows document submission based on fixed password authentication. This system, implemented at the initiative of several courts of appeal but covering all lower courts in their territorial jurisdiction, is now being superseded by another similar database, accessible via two-factor authentication (user account name and a one-time password communicated via SMS). This database, which also

26 This is a requirement of the Cooperation and Verification Mechanism implemented by the European Commission, to which Romania is still subject. European Commission 2021b. 16.

27 For details of the structure and functioning of the ECRIS system, see Ciolacu–Viorel 2017.

28 No detailed documentation for the internal functioning of this system is available to the public.

contains scanned documents from the casefile and allows for online document submission, was pioneered by the Arad Tribunal (and IT developer Dacian Stanciu) and is known as 'TDS'.[29]

The lack of leadership in these initiatives is clear: they originate neither from the Government nor from the Ministry of Justice nor from the Supreme Council of the Magistracy (the highest organ for the governance of the judiciary). No specific legal framework has been adopted to govern these systems, nor to unify them or operate them under central supervision.

Both the online casefile access and document submission initiatives are operated on ICT systems set up by the courts of appeal, or the Arad Tribunal as the case may be, as can be ascertained by queries[30] to the ROTLD registry of Romanian websites. The ECRIS CMS and the online Portal of Romanian Courts are operated from ICT systems under the control of the Special Telecommunications Service (as shown by ROTLD data), a militarized government agency for the supervision of vital state telecommunications. No publicly available regulation exists – with the notable exception of the ECRIS CMS – for even the user-level operation of any of these systems, and their technical documentations are not publicly available.

Clear procedural norms for the effects of documents submitted or served through such systems are also partly absent. For example, the Code of Civil Procedure (CCP) permits service of procedure and of other documents by the court via e-mail or any 'other means which ensure the transmission of the text of the document and the confirmation of its receipt' [Article 154(6), CCP], but it seems to permit receipt and registration by the court of only hardcopy (paper-based) documents or documents transmitted by e-mail or in the form of electronic documents – in the latter case without any reference to the mode of transmission [Article 199, CCP]. Thereby, the patchwork of casefile access and document submission systems occupy a grey area in the field of party–court and lawyer–court communication.

Another issue posed by this system is that it is not comprehensive: specifically, it does not ensure that the court has direct access to other databases (the land registry and other similar registries, including personal identification registers, and the company register). The personal identification registers according to the CCP, for example, should be directly accessible to the court itself [e.g. Article 154(6) of the CCP], while access to other registries would greatly enhance the court's ability to obtain information on its own motion or at the request of the parties.

After the outbreak of the COVID-19 pandemic, the legislator suddenly discovered the potential benefits of ICT deployed for court purposes, and in the contents of

29 For an example of the access interface, see: https://doc.curteadeapeloradea.ro/autentificare. No detailed documentation for the internal functioning of this system is available to the public.

30 See https://rotld.ro/whois/.

Law No. 55/2020 on Some Measure for the Prevention and Combatting of the Effects of the COVID-19 Pandemic provided for the possibility of online teleconferencing during certain procedures (mostly concerning persons placed under surveillance). These measures were later expanded by Law No. 114/2021 on Some Measures in the Domain of Justice in the Context of the COVID-19 Pandemic. This latter law in its articles 3(1) and 3(2) allowed that in civil cases, and with the agreement of all parties, teleconferencing could be used during the civil trial. Similar provisions were introduced for criminal procedures. The given court had full discretion on admitting or rejecting such requests. Electronic transmission of casefile contents, whenever possible between courts, was also allowed. Again, no central system or governance of the ICT solutions was implemented.

Thereby, the conclusions of the CEPEJ 2016 report remained largely valid for the pandemic period as well, with the notably higher degree of interest awarded to the issue of ICT deployed for court purposes on the side of the legislator. Notable failures of this approach include that the norms were mainly concerned with using ICT in general for resolving the issues posed by the pandemic, without reference to any dedicated solutions (e.g. for teleconferencing, with some courts using Google Meet or Zoom for these purposes). No initiatives for electronic adjudication or machine-assisted case processing surfaced. Any implementations of artificial intelligence were also notably absent. Finally, and perhaps most troublingly, no viable initiatives were as yet proposed for making dedicated court ICT platforms directly accessible for clients, legal professionals (mainly lawyers), or other frequent court users.

We may conclude here that although the COVID-19 pandemic served – and continues to serve – as a strong facilitator for the digital transition in the court system, its potentially beneficial effects are countered by the factors of inertia inherent in the activity of the legislator, as well as by the chronic lack of strategic thinking,[31] as documented in the CEPEJ 2016 report.

5. The EU 'Toolbox of Opportunities' for the Digitalization of the Judiciary

Recognizing the opportunities presented by the digit(al)ization of court activities, the European Commission drafted and in 2020 forwarded a communication[32] (in effect, an incipient proposal for legislative action) addressed to the European

31 The Forum of Romanian Judges proposed a series of digit(al)ization objectives during the pandemic period; however, this elicited no response from the central governing bodies of the judiciary. See: *FJR solicită Consiliului Superior al Magistraturii, Ministerului Justiției, Serviciului de Telecomunicații Speciale şi tuturor instanțelor judecătoreşti să pună în practică o digitalizare extinsă a instanțelor judecătoreşti*. 2020.

32 European Commission 2020a.

Parliament, the European Council, the European Economic and Social Committee, and the Committee of the Regions with the title *Digitalization of Justice in the European Union – A Toolbox of Opportunities*. This communication was accompanied by a Staff Working Document as an explanatory note to the methodology used.[33]

The communication by the European Commission – due to the survey period's overlap with the COVID-19 pandemic – was able to take into consideration this new situation from the perspective of digit(al)ization of the judiciary. It stated as a goal that:

> Every means available should be used to support the transition to digital justice, including the new cohesion policy instruments, the new 'justice' and 'digital Europe' programmes, as well as the Recovery and Resilience Facility. The Recovery and Resilience Facility aims in fact at supporting the national investments and reforms that are essential for a sustainable recovery. This is why, when setting out guidance to help Member States to prepare and present their recovery and resilience plans for the implementation of the Recovery and Resilience Facility, the Commission stressed that the digital transformation of the justice sector is one of the domains in which Member States are strongly encouraged to focus reforms and investments. National initiatives in this regard can be counted towards the 20% digital expenditure target under the Recovery and Resilience Facility, in order to realise a 'Europe fit for the digital age'.

5.1. EU Financing for 'Digital Transition' in Court Procedures in Member States

Therefore, significant financing is now earmarked for purposes of digit(al)-ization of court activities in the 2021–2027 budgetary period by means of a so-called Technical Support Instrument, proposed[34] to be set up by the European Commission, which in its articles 5(b) and 5(e) refers to supporting e-governance and to 'the digital and the green transitions'.

The 'toolbox of opportunities' in the field of court digit(al)ization as a policy instrument is meant to foster support for initiatives providing new, digital public services to citizens, to encourage inclusion of such services in the national Recovery and Resilience Plans of Member States, to facilitate funding requests through the Technical Support Instrument, to make financial support available under the 'justice' and the 'digital Europe' programmes, and, finally, to implement particular digit(al)ization projects in Members States.

33 European Commission 2020b.
34 See European Commission 2020c.

5.2. The European Commission's Legislative Programme on Encouraging the Digit(al)ization of Court Procedures

Along with increased financing, the 'toolbox' also contains proposed legislative action at the EU level for implementing some ICT solutions relevant to court activity, in line with the objective set forth in the Commission Work Programme 2021, having the title *A Union of Vitality in a World of Fragility*.[35] Specifically, the communication included the following principal measures:

> Require Member States by default to use digital channels for cross-border communication and data exchanges between competent national authorities;
> Require Member States to accept electronic communication for cross-border procedures involving citizens and businesses, without ruling out the use of paper;
> Guarantee that the solutions and principles set out in the eIDAS Regulation are referenced and used, in particular:
> – the principle that electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form;
> – electronic identification and signatures/seals should become acceptable for the digital transmission of judicial documents and their appropriate assurance levels agreed.
> Provide a basis for the processing of personal data, within the meaning of the General Data Protection Regulation and applicable Union rules on data protection and determine the responsibilities of different controllers and processors;
> Ensure that any electronic access points established for use by the general public cater for persons with disabilities;
> In order to ensure that national IT systems are interoperable and able to communicate with each other, lay down the broad architecture of the underlying IT system for digital communication.

The interconnection of various registers, improving video conferencing capabilities, setting up the e-CODEX (an e-Justice communication platform), and broadening the e-evidence digital exchange system (eEDES), as well as digit(al)-ization in the field of criminal justice, were also put on the agenda. In order to promote national coordination and monitoring, information and best practices in the implementation of the 'toolbox' of measures are also set to be shared with the European Commission and other Member States.

35 European Commission 2021a.

6. Romania's Proposed Measures to Further the Digit(al)ization of Courts under the National Recovery and Resilience Plan. Conclusions

Romania included in its Recovery and Resilience Plan[36] submitted to the European Commission the following measures for digit(al)ization of the justice system (under the subtitle *Investment 4. Digitalization of the Judiciary*):

> – the technical transition from local to shared central servers – it shall optimise the management and usage of technical resources (central servers, data centres, virtualization servers).
> – upgrade and finalization of the technical infrastructure for teleworking and digitalization of documents with the aim of increasing the resilience of the judicial system.
> – improvement of cybersecurity capabilities (by providing equipment and training) both at central and local level (in particular to courts, but also to prosecutors' offices).
> – implementation of a new system allowing secure videoconferencing for the participation of judges in online activities at the level of the High Court of Cassation and Justice.
> – support the finalization of ECRIS V system, which is the central element of the digital transformation of the judiciary in Romania. The development of the system, a part of procurement of related software and supporting hardware and the training of users is financed by the Operational Programme 'Administrative Capacity'. Under the recovery and resilience plan, complementary measures shall be financed (such as: procurement of a part of the supporting equipment as part of the virtualization project which shall facilitate the transition from ECRIS IV to ECRIS V, the setting up of the data centre for the judiciary which shall also host ECRIS V, procurement of PCs and other equipment for the end-users).
> This investment underpins the strategy for the development of the judiciary 2022–2025, which includes specific measures to ensure digital interaction of the litigant and any interested entity with the judiciary, electronic signature and electronic seal, availability of improved data communication for e-file (which is an option for litigants to electronically access the judicial files), elaboration of a cross-judicial sector strategy for the digitization of the physical archive. (milestone 421)

36 Government of Romania 2021.

These measures are to be contained in a law approving the strategy for the development of the judiciary 2022–2025. As of yet, no publicly available draft of this law could be found.

The descriptions of the objectives themselves show a high degree of unfamiliarity with the problems of court digit(al)ization by the Romanian government. The proposed measures are in fact partly a strengthening of existing initiatives (centred around the acquisition of new hardware resources and with a high degree of emphasis on developing new capabilities for the ECRIS CMS). The proposal does refer to the e-file, which is meant to offer party access to the ECRIS CMS, and to a new impetus for the use of electronic signatures (these being elaborated in the milestone list of the proposal); however, this does not extend to lawyers and other court users. Nor does the ECRIS CMS-proposed upgrade resolve the data access issue for the court with a view to online registries. Finally, no legislative action is proposed to remedy the lack of strategy in the digit(al)-ization endeavour.

The proposed measures treat court digit(al)ization as a matter for the judiciary and the central administration of the justice system, without regard to other categories of stakeholders, such as lawyers and other frequent court users, whereas these categories should be included in (or at the very least consulted regarding) any future measures. They also ignore any means by which court activity in the field of adjudication could be accelerated (e.g. an electronic procedure for small claims or orders for payment) or by which direct court-to-party, court-to-lawyer, party-to-court, or party-to-party communication could be facilitated.

Another negative aspect of the proposal is that it ignores the resources represented by lawyers – as qualified professionals who may competently cooperate with courts – when granting access to the ECRIS CMS system, as the proposal in this way fails to address one of the main causes of judicial delay: the difficult and inefficient service of procedure and documents. This is an issue we would propose correcting by making compulsory the use of the ECRIS CMS for the purposes of service of procedure to all clients represented by lawyers and to all clients acting without legal representation if the case value exceeds a certain amount and in all cases involving at least one professional party.

Finally, the proposed timeline of the actions (with some measures set to be implemented in the first quarter of 2022 and others by 2023) is obviously unrealistic.

All these factors make us question whether the Romanian proposal for court digit(al)ization is viable and will prove efficient in the future.

References

BLOOMBERG, J. 2018. Digitization, Digitalization, and Digital Transformation: Confuse Them at Your Peril. *Forbes*. 29.04.2018. https://www.forbes.com/sites/jasonbloomberg/2018/04/29/digitization-digitalization-and-digital-transformation-confuse-them-at-your-peril/?sh=4e52f5ac2f2c.

CIOLACU, F.–VIOREL, G. 2017. *Ghid practic în domeniul managementului activității grefierului în procesul civil*. http://inm-lex.ro/fisiere/d_1821/Ghid%20Managementul%20activitatii%20grefierului%20in%20procesul%20civil.pdf.

EUROPEAN COMMISSION. 2020a. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Digitalization of Justice in the European Union – A Toolbox of Opportunities.* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN.

2020b. *Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Digitalization of Justice in the European Union – A Toolbox of Opportunities*. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020SC0540.

2020c. *Proposal for a Regulation of the European Parliament and of the Council Establishing a Technical Support Instrument*. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:0409:FIN.

2021a. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021 – A Union of Vitality in a World of Fragility*. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0690.

2021b. *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism*. https://ec.europa.eu/info/sites/default/files/progress_report_romania_com2021_370_fina.pdf.

EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE. 2016. *European Judicial Systems. Efficiency and Quality of Justice. Thematic Report: Use of Information Technology in European Courts*. https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680786b57.

GONZALEZ-DIAZ, R.–STELLDINGER, P.–LATECKI, L. J. 2020. Digitization. In: *Computer Vision*. Cham (https://doi.org/10.1007/978-3-030-03243-2_645-1).

GOVERNMENT OF ROMANIA. 2021. *Proposal for a Council Implementing Decision on the Approval of the Assessment of the Recovery and*

Resilience Plan for Romania. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:608:FIN.

SCHMIDT, R.–ZIMMERMANN, A.–MÖHRING, M.–NURCAN, S.–KELLER, B.–BÄR, F. 2016. Digitization – Perspectives for Conceptualization. In: *Advances in Service-Oriented and Cloud Computing*. Cham (https://doi.org/10.1007/978-3-319-33313-7_20).

VELICOGNA, M. 2007. Justice Systems and ICT – What Can Be Learned from Europe? *Utrecht Law Review* 3: 129–147.

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The Openness of Civil Court Proceedings in the Time of the COVID-19 Pandemic

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Abstract. The COVID-19 pandemic has resulted in the adoption of several measures to protect public health during civil trials in Poland. Some of these measures have restricted the traditionally open nature of the trial by allowing for closed hearings to be held in situations not regulated before. This study examines such situations in the light of international human rights instruments, from the dual perspectives of internal (between the parties) and external (towards third parties) openness of court hearings. It is established that such hearings do not contravene international human rights instruments pertaining to a fair trial if the restrictions are well-founded and proportional, even though some measures have to be taken in order to protect parties and third parties vulnerable to the lack of the necessary instruments or technical knowledge to attend hearings remotely. The author concludes that some restrictions to open court civil proceedings during the COVID-19 pandemic are likely to remain in place, and the possibilities of remote access may even prove beneficial in enhancing the principle of the open trial.

Keywords: COVID-19, fair trial, public hearing, open court, Poland

1. Introduction

Before February 2020, probably nobody in Poland and in many other jurisdictions thought that such a basic procedural principle as the openness of court proceedings may be widely restricted. However, the COVID-19 pandemic arrived, and even such a bedrock rule had to be rethought and adjusted to the new pandemic reality. Due to the hazard to life and health, special measures have been adopted to limit or exclude the open court principle. The aim of this article is to critically consider those measures.

To attain this goal, the paper is structured as follows. Firstly, the importance of the open court principle is presented. Part 3 elaborates on the measures introduced, and the analysis is divided into the modification in reference to the internal openness (part 3.1) and the external openness (part 3.2). Furthermore, the

paper considers the best solution to the current situation, which tries to reconcile the elaborated principle with the current pandemic situation. The paper ends with a short conclusion.

2. The Openness of Civil Court Proceedings

The openness of civil court proceedings[1] is recognized in international instruments such as:

– The European Convention on Human Rights and Fundamental Freedoms; hereinafter: *ECHR*, in Art. 6 sec. 1;[2]

– The International Covenant on Civil and Political Rights; hereinafter: *ICCPR*, in Art. 14 sec. 1;[3]

– The Charter of Fundamental Rights of the European Union; hereinafter: *CFR*, in Art. 47.[4]

Recognition of this feature of court proceedings, including civil ones, in such instruments leads to at least two conclusions. Firstly, the openness of the hearing may be seen as one of the most important features of civil court proceedings.[5] Secondly, in every democratic country, this should be the feature characterizing civil proceedings. Therefore, the following question arises: what should be understood by it?

1 Hereinafter also as: open court principle.

2 Article 6 – *Right to a Fair Trial* – para. 1. 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and *public hearing* within a reasonable time by an independent and impartial tribunal established by law. *Judgment shall be pronounced publicly, but the press and the public may be excluded from all or part of the trial* in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice' (emphasis added).

3 '1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and *public hearing* by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children' (emphasis added).

4 Article 47 – *Right to an Effective Remedy and to a Fair Trial*. 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and *public hearing* within a reasonable time by an independent and impartial tribunal previously established by law' (emphasis added).

5 See Miszewski 1933. 11; Zembrzuski 2021. 6.

As it is often indicated and can be derived from the wording of Art. 6, para. 1 of the ECHR, the openness of civil court proceedings is realized by a right to a public hearing of the case and the public announcement of judgments.[6] It is noteworthy, however, that in the case of the openness of civil court proceedings we are dealing 'only' with the principle. Such openness may be restricted. A prominent example is the fact that in most jurisdictions there are cases, issues, or situations in which provisions explicitly allow them to be adjudicated during closed hearings.[7] Furthermore, the press and public may be excluded from all or part of a certain trial that should normally be open to the public.[8]

Regardless of those potential exceptions, the importance of the open court principle should not be underestimated. As the titles in Article 6 ECHR and Article 47 CFR suggest, the openness of civil court proceedings constitutes one of the guarantees of *a fair trial*.[9] Therefore, the question may be asked as to how this principle contributes to it. As indicated in the literature, this feature aims to:

– protect the parties from justice carried out without public oversight,
– avoid arbitrary court case decisions and mobilize judges to be diligent,
– ensure the correct course of the proceedings,
– build citizens' trust in the courts,
– educate the public on how the justice system operates.[10]

In view of the above, there should be no doubts that the open court principle constitutes one of the most important rules of civil proceedings. As it was amply indicated some time ago: 'it is an achievement and a measure of progress; an exponent of the rule of law; a guarantee of an independent, impartial and scrupulous jurisdiction'.[11]

The COVID-19 pandemic and the restriction implemented as a result of it pertaining to the openness of court proceedings[12] seem to pose a threat to, or at least undermine, the importance of this principle.[13]

6 See Litowski 2021. 68.
7 For more on this issue, see Part 3.1 of this paper.
8 However, certain conditions have to be met. See, for example, Art. 6, para. 1 ECHR. More on this issue below.
9 See Zembrzuski 2021. 7. Right to a fair trial constitutes an internationally recognized human right. See OSCE 2020. 6.
10 Litowski 2021. 68–69; T. Zembrzuski 2021. 6–8.
11 Miszewski 1933. 11. The author's own translation. Original sentence: 'jest zdobyczą i probierzem postępu; wykładnikiem praworządności; rękojmią niezawisłej, bezstronnej I sumiennej jurysdykcji.'
12 The problem of a form in which the restrictions have been introduced exceeds the scope of this article. For more on the issue, see, for example: OSCE 2020. 11–12, 14.
13 As it was more broadly stated, 'the right to a fair trial (…) are at particular jeopardy'. OSCE 2020. 8.

3. Introduced Modifications

The COVID-19 pandemic was a huge challenge for many judicial systems,[14] notably for those that have not properly followed the spirit of the current technological revolution, i.e.[15] those systems in which communication between the court and parties still occurred mainly on paper and face-to-face.[16] In such jurisdictions, the court proceedings were almost totally frozen when the pandemic set in.[17] However, after the horrifying start of the pandemic, even such judicial systems realized that the courts cannot be permanently closed and that they have to adjust to the new COVID-19 reality.[18] As it was graphically said, 'the pandemic catapulted the judiciary into the age of technology'.[19] Courts began to render judgements, but numerous modifications to civil proceedings have been introduced as a rule.[20] Many of them were or are still marked as 'temporary ones'; however, the uncertainty regarding the pandemic and the 'efficiency' of these modifications raise the question whether they really can remain only transitional measures.[21]

In the context of this article, the relevant modifications are those introduced during the COVID-19 regarding the openness of civil court proceedings. To consider them in a more structured way, the principle can be viewed from two perspectives. *External openness* refers to the openness of court proceedings in reference to third parties.[22] On the other hand, we can also distinguish *internal openness*, i.e. the openness of proceedings in reference to parties to a dispute.[23]

Such distinction is important since the latter may be restricted to only very limited and exceptional circumstances.[24] Exceptions to external openness are more numerous and easier to encounter.[25]

3.1. The Internal Openness Perspective

As mentioned above, the internal openness of civil court proceedings will not, as a rule, be restricted, as under *normal circumstances* such exclusion or limitation may lead to the situation that a party is prevented from defending

14 See OSCE 2020. 4. See also: OSCE 2021. 74–79.
15 See OSCE 2020. 20.
16 See OSCE 2020. 22–23.
17 See OSCE 2020. 4, 9, 23.
18 See OSCE 2020. 4, 9, 23.
19 OSCE 2020. 20.
20 OSCE 2020. 4–45.
21 For more on external openness, see: Zembrzuski 2021. 7. The author argues that some of the measures introduced as transitional ones should stay in the Polish civil procedure permanently.
22 See, for example, Kościółek 2021. 24.
23 For more on internal openness, see, for example: Litowski 2021. 68.
24 Some may argue that internal openness can never be limited. Such statement is also made in Litowski 2021. 68.
25 See, for example, Art. 6, para. 1 ECHR and the exceptions provided there.

his/her case, which may consequently lead to, e.g. the invalidity of the court proceeding.[26]

However, the COVID-19 pandemic was and is still not treated as a set of normal circumstances.[27] Therefore, also some limitation in reference to this aspect of openness may be found in pandemic regulations. However, before referring to such limitations, an important terminological distinction must be made. Usually, from the perspective of the openness of civil court proceedings, we can distinguish *open court hearings* and *closed court hearings*.[28] The latter may be closed not only for the public but also in reference to the parties. In the first situation, we may speak about limitation to external openness, but not to the internal one. Therefore, this part of the paper focuses on the closed hearings that are, at least to some extent, closed even with respect to parties to a dispute.

The idea behind such closed hearings is that the presence of parties is not required with respect to certain issues.[29] As a rule, only formal or incidental issues are being adjudicated by a court during such hearings.[30] However, in some jurisdictions, even judgments on merits may be rendered under certain circumstances by courts subsequent to such hearings.[31] In Poland, even before the pandemic, we have seen a slow trend of allowing more and more issues and cases to be settled in such closed hearings.[32] What is more, even the basic rules were changed.[33] The main reason for such changes is the efficiency and pace of court proceedings.

However, in this paper, in accordance with its title, emphasis should be placed on the measures limiting the internal openness introduced during the COVID-19 pandemic. We can consider at least the following potential exclusions or restrictions to internal openness:

26 In reference to Polish law, Art. 379, point 5) of the Polish Code of Civil Procedure (henceforth: the Polish CCP), to Kościółek 2021. 29, and to Zembrzuski 2021. 8.

27 At least currently; and it remains to hope that it will not be a constant presence.

28 Also often named as 'open hearings' and 'closed hearings'. On this distinction, see, for example, Zembrzuski 2021. 5.

29 Miszewski 1933. 6.

30 Compare Zembrzuski 2021. 11.

31 See, for example, Art. 148^1 § 1 of the Polish CCP, which states that the court may hear a case held in a closed hearing if the defendant has admitted a claim or if the court considers – after the parties have submitted pleadings and documents and after they have submitted oppositions or objections to the order for payment or an opposition to a default judgment, having regard to all arguments and evidence – that a trial is not necessary. However, according to 148^1 § 3 of the Polish CCP, a case may not be heard in a closed hearing if the party included a motion to hold a trial in his/her first pleading, unless the defendant has admitted a claim.

32 For more on this, see Zembrzuski 2021. 11–13.

33 Since 5 August 2019, a court does not need to have explicit legal basis to issue an order on the closed hearing. Currently, in the Polish CCP, Article 148 § 3 provides a general authorization for the court to issue orders on closed hearings. For more on the issue, see Zembrzuski 2021. 13.

1. introduction of additional circumstances in which certain issues can be solved during a hearing closed for the parties,

2. introduction of the possibility to issue *a judgment* by a court after a closed hearing,

3. the issue of videoconferencing during court hearings.[34]

With regard to the first situation, an introduction of new issues that can be solved in closed hearings is not a novelty.[35] However, such a modification should have valid grounds. Preferably, it should be based on the nature of an issue or a case,[36] be connected with health considerations and maybe have only a temporary nature.[37] Notably flawed seem to be those modifications that allow for the resolution of certain issues during a closed hearing due to 'technical problems'.[38] In other words, *faulty technology* would be a reason *to limit one of the most basic civil procedural law principles*.[39] This should not be the case. A limitation of internal openness on the basis of technological reasons should be possible only if there is a consent of the parties to the dispute.[40] The lack of a consent requirement and such limitation may especially raise the question of whether these types of modifications are in line with Art. 6, para. 1 ECHR.[41]

As the second restriction to internal openness, new COVID-based possibilities to issue judgements by the court after closed hearings can be observed. Some may say that this is only a subcategory of the above elaborated issue. However, this issue shall be considered separately, if only for the reason that Art. 6 of the ECHR clearly distinguishes the right to public hearing (session)[42] and the right to the public pronouncement of a judgment.[43]

The COVID-19 pandemic and social distancing rules may constitute a ground on which states will try to limit the publicity of the pronouncement of a judgement. Such restrictions are more interesting from the perspective of external openness of court proceedings. However, the COVID-19 pandemic showed that legislators can

34 In reference to the issue of videoconferencing, see OSCE 2020. 21–24.

35 Similarly, Zembrzuski 2021. 13.

36 Zembrzuski 2021. 11.

37 Cf. Zembrzuski 2021. 13.

38 This is what the new Polish COVID legislation will in essence try to attain. For more on the issue, see Zembrzuski 2021. 13–14.

39 Cf. Zembrzuski 2021. 14.

40 Currently, on the basis of the Polish COVID-19 legislation [*Ustawa z dnia 14 maja 2020 r. o zmianie niektórych ustaw w zakresie działań osłonowych w związku z rozprzestrzenianiem się wirusa SARS-CoV-2 (Dz. U. poz. 875 z późn. zm.)*] – henceforth: *the Polish COVID-19 legislation* – one of the conditions to be fulfilled to hold a closed hearing, besides technical difficulties and a threat to health, is that neither party should object to the holding of a closed hearing. However, as mentioned above, this condition will be probably abandoned in the future. For more details, see Art. 15zzs[1] of the Polish COVID-19 legislation and Zembrzuski 2021. 13–14.

41 Kurczewska 2021.

42 The first sentence of Art. 6, para. 1 ECHR.

43 The second sentence of Art. 6, para. 1 ECHR.

be quite creative and can introduce also limitations in reference to this aspect of internal openness. For example, according to Art. 15zzs[2] of the Polish COVID-19 legislation, if, in the case examined pursuant to the provisions of the Polish CCP, the evidentiary proceedings have been conducted in full, the court may close the hearing and issue a ruling in a closed hearing after having received written statements from the parties or participants in the proceedings. Such a limitation to internal openness may be seen from two perspectives. Firstly, if a hearing was closed, and, therefore, parties had an opportunity to present their position during the hearing, it seems there is no harm to the parties in the judgment alone being delivered in a closed hearing. Such judgment will be served to the parties, and they will have an opportunity to appeal it. Therefore, it seems there is no real harm to internal openness here. On the other hand, the question may be asked as to whether such a general limitation is in line with Article 6, para. 1 of the ECHR. This norm explicitly provides for exceptions to external openness; however, it may be questioned whether they refer to internal openness. The question is interesting since the word 'publicly' may suggest that Art. 6, para. 1 of the ECHR refers only to external openness and not to the internal one. If so, the question may be asked whether ECHR allows at all the limitation of internal openness. If so, under what conditions?[44]

At the end of this part, the issue of the online court hearing may be elaborated on. The COVID-19 threat to human health caused court hearings in many jurisdictions to start taking place in online form.[45] The question may be asked whether this constitutes a restriction to the internal openness of court proceedings. It seems that, as a rule, a change in the form of participation in a hearing, from traditional to online, does not constitute a restriction to internal openness.[46] As it is amply noted in the literature, we are not dealing with the implementation of new institutions but only with the progressive computerization of court proceedings.[47] Parties communicate directly with the court and have an opportunity to present their standpoints, submit requests, contest the position of the opposing party, and discuss issues with a judge.[48] Generally, it cannot be said that the internal openness of hearings was limited.

A problem arises only in reference to those parties that do not have appropriate equipment, software or have difficulties operating modern devices. As it was noted, 'marginalized communities are unlikely to have access to videoconferencing technology and risk being disadvantaged in terms of access to justice'.[49] If they

44 The indicated problem exceeds the scope of this article.

45 See OSCE 2020. 9. For more on this issue in reference to the Polish law, see, for example, Zembrzuski 2021. 9–10.

46 A similar position is presented in Zembrzuski 2021. 9.

47 Similarly, Zembrzuski 2021. 9.

48 Cf. Zembrzuski 2021. 10.

49 OSCE 2020. 13. See also: Canadian Bar Association 2013; Fielding–Braun–Hieke 2020.

are not urgent, then trials regarding such persons shall be postponed, or some special regulations shall be provided for them, which will allow such persons to attend online court hearings.[50] Importantly, 'The right to a fair trial must not be jeopardized by any technological solutions to the pandemic',[51] wherefore a court should be able to resign from online hearings if such hearings could lead to unfair trials. It is noteworthy that currently online court hearings often raise the problem of lacking external openness; however, this issue will be elaborated upon below.[52] It may be added at the end that online hearings will probably not cease to exist once the pandemic is over. They are likely to coexist and supplement the traditional form of proceedings.[53]

3.2. The External Openness Perspective

The *external* openness of civil court proceedings refers to the openness of a civil court proceeding in reference to third parties, the so-called 'public'.[54] The wording of the relevant articles of the ECHR, ICCPR, and CFR indicates that those instruments refer entirely or at least mainly to this type of openness. In the case of external openness, it is much more difficult to determine in general what the procedural consequences will be in case of improper limitations.[55] It seems that we cannot say that proceedings in such cases will be always void and third parties will have the right to contest a judgment. Since it is very difficult to speak about the consequences in general, this issue exceeds the scope of this paper and deserves an article or even a book of its own.

However, ignoring the consequences, we can still consider at least the following potential exclusions or restrictions to the external openness principle during the COVID-19 period:

1. *prohibition* in reference to third parties regarding entering 'open hearings' in a court building,

2. an introduction of possibilities to issue a judgment by the court outside of public hearings,

3. *restrictions* in reference to third parties regarding entering 'open hearings' in court building.

The first issue refers to the situation of a planned hearing in the courtroom, but where third parties are not allowed to enter. Such restriction is usually based on

50 For example, a court in such situations should be obliged to appoint a 'technical assistant' whose task would be to assist the party by providing the appropriate equipment and advice to make the online hearing possible. The problem is indicated in OSCE 2020. 25.

51 OSCE 2020. 28.

52 See Part 3.2. of this article.

53 For more on this issue, see Part 4 of the paper.

54 See, for example, Kościółek 2021. 24.

55 This issue is considered in reference to the Polish law, for example, in: Broniewicz 1954. 92.

the COVID-19 justification, i.e. a reduction of risk of transmitting the COVID-19.[56] Simply put, open courts in such times can put the health and the life of citizens at risk.[57] The mentioned measure may lead to the conclusion that the court *should* be closed for the public during the COVID-19 pandemic; to be in line with the principle of external openness in such times is simply impossible[58] – notably since such restraint may be seen as within the quite broad bounds of Article 6, para. 1 of the ECHR, permitting exceptions based on public order and/or national security.[59] Therefore, at the first glance, such prohibition may be seen as being in accordance with the ECHR and other international instruments. However, seeing how important the open court principle is for democratic societies,[60] the question may be asked whether the analysis should end here.

The authors of the ECHR did not have in mind new technologies and the opportunities which they create. Thanks to such novelties, we are currently able to hold open hearings with the simultaneous remote participation of the public.[61] Such opportunity allows, on the one hand, to avoid health concerns and, on the other, to be in line with the rule of the external openness of civil court proceedings. Thus, the risk regarding spreading the virus may constitute a good ground to deny access to the courthouse or courtroom but should not constitute a basis for denying remote access to the proceeding. To back up the above argumentation, it may be added that, according to the Siracusa Principles,[62] restrictions should be the least intrusive and restrictive available to reach the objective.[63] In other words, such denial may be seen as disproportionate.[64] The issue of remote access of third parties to proceedings will be discussed in more detail below.[65]

Furthermore, it is worth distinguishing a situation in which even a judgment is pronounced without the participation of third parties because their access has been prohibited. Such secrecy seems to be even more far-reaching than the secrecy of a 'normal' hearing. The lack of a public pronouncement of a judgment may deprive parties of the protection provided thanks to the public oversight of justice and may consequently lead to more arbitrary court decisions. What is more, in some jurisdictions, the lack of the public pronouncement of a judgment

56 This paper does not consider the form in which such restriction has been adopted. In reference to this problem, see, for example, OSCE 2020. 21.

57 See Kościółek 1954. 32.

58 Compare Kościółek 1954. 32.

59 Similarly, but in reference to the same premises included in the Polish Constitution, see Kościółek 1954. 28.

60 See Part 2 of this paper.

61 'Alternative means of communicating with court users should be considered in order to reduce the numbers of persons attending court in person'. OSCE 2020. 21.

62 American Association for the International Commission of Jurists 1985.

63 For more on the Siracusa Principles, see OSCE 2020. 7.

64 See OSCE 2020. 8.

65 See Part 4 of this paper.

may lead to its legal non-existence.[66] Being outside the scope of Art. 6, para. 1 of the ECHR exceptions, such remarks do not result in the public pronouncement of a judgment. It has to be indicated that the wording of this provision is quite broad: 'all or part of the trial'. However, the above commentary justifies the conclusion that even if a proceeding was closed for the public for reasons of COVID-19 restrictions, at least the pronouncement of the judgment will be available publicly. In this case, *publicly* would mean that third parties should have remote access to the pronouncement. The situation in which the court does not want to provide online access to the pronouncement of the judgment for reasons of COVID-19 restrictions should not be in accordance with the open court principle. Such pronouncements do not constitute a threat to human health, and the technological reasons should not be seen as a sound basis for depriving parties of the very guarantee of a fair trial.

The third issue refers to a situation of a planned hearing in the courtroom where there are, however, additional requirements for third parties that have to be fulfilled to enter the courtroom. As the COVID-19 pandemic showed, such prerequisites may relate, for example, to:

– submitting an appropriate motion,

– obtaining the consent of a specific person (usually one of the judges),

– indication of the maximum number of the third parties who can take part in the hearing.[67]

As in the case of the absolute prohibition, such restrictions are based on the COVID-19 justification, i.e. a reduction of risk of transmitting the COVID-19. Since more far-reaching restrictions (total exclusion) were in line with Art. 6, para. 1 of the ECHR, exceptions less far-reaching should also be in compliance with the ECHR (*a maiori ad minus*). However, again, providing for third parties a possibility to participate in court hearings remotely may be the solution that deprives such restrictions of the mentioned justification and that is in line with the rule of openness of court proceedings. Therefore, it should not be surprising that there are cases of hearing broadcasts, for example, via YouTube.[68]

4. Remote Hearings and Remote Access to Hearings

As already indicated, remote access to court hearings may be the solution to the COVID-19 problems described above. Thanks to it, we can avoid a threat to public health since we are able to exclude the risk of spreading the virus in the courthouse. Therefore, we are able to maintain the openness of court hearings

66 See considerations regarding this issue in reference to the Polish law: Kościółek 1954. 30–31.

67 For more on these restrictions in Poland, see Kościółek 1954. 29.

68 OSCE 2020. 22.

and eliminate the cause on the basis of which openness was limited. In other words, as a result, we are able to maintain the international procedural standard expressed in Art. 6, para. 1 of the ECHR, in Art. 14, para. 1 of the ICCPR, and in Art. 47 of the CFR. Thus, it should come as no surprise that such a solution existed or was introduced in many jurisdictions during the pandemic.[69] Furthermore, remote access to court hearings would probably cause that the goals which we try to attain are better attained thanks to the principle of openness of civil court proceedings.[70] It is not a secret that there is no audience in most civil court proceedings.[71] A situation in which a person can follow a court hearing from his/her apartment may change this. Hopefully, that will increase citizens' trust in the court[72] and lead to higher public oversight of court decisions.

It is noteworthy that this not a solution without risks and drawbacks.[73] Firstly, the technological transformation is usually not a low-cost process.[74] Problems may refer to, for example, no or poor Internet connection or the lack of necessary equipment.[75] The potential pandemic recession may cause that many jurisdictions will not have the resources to transform courthouses from physical to physically digital ones. There are also data protection and privacy concerns.[76]

Secondly, we have to bear in mind that traditional court hearings before the pandemic were not *fully* open either. Besides the COVID-19 pandemic justification, there are also other reasons which may allow the court, on a case-by-case basis, to close the hearing to the public.[77] Obviously, in such cases, remote access should not be provided to third parties.

Furthermore, in most jurisdictions, we can find some general limitation regarding who can participate in the open court hearings. For example, only adults may be allowed access to the public hearing.[78] Moreover, witnesses who

69 Videoconferencing was used in civil procedures, among others, in Austria, Croatia, France, Hungary, Ireland, Kazakhstan, Portugal, Serbia, Slovenia, Sweden, the United Kingdom, and Poland. See OSCE 2020. 22 and Kościółek 1954. 32–33.

70 In reference to these goals, see Part 2 of this paper.

71 This remark is based on the author's professional experience in reference to Polish civil court proceedings.

72 If we have only a plaintiff and a defendant in a case, then usually at least one of the parties will not be happy with the judgment and may blame the court for that. The audience may silently support the court decision and cause more persons to be contented with the judgment as opposed to the ones that are not. Hereby, the audience may give a decision greater legitimacy and cause the court to be better perceived. We have to bear in mind that even courts are now evaluated on Google.

73 In reference to some critics, see, for example, Harsagi 2012 and Fischer 2012.

74 OSCE 2020. 27.

75 For more on the issue, see OSCE 2020. 7 and a virtual mock trial carried out by the UK-based organization Justice: https://justice.org.uk/our-work/justice-covid-19-response/.

76 This issue exceeds the scope of this article. For more on this, see: OSCE 2020. 7, 14.

77 See, for example, Art. 6, para. 1 ECHR.

78 See Art. 152 of the Polish CCP.

have not yet testified may not attend the examination of other witnesses.[79] Therefore, even if it may be seen as a restriction to the external openness of court proceedings, a person who wants to attend a court hearing remotely should be to some extent verified.[80] As it is very aptly indicated in the literature: 'While allowing the possibility of remote observation of court hearings by third parties, one should also remember about the need to ensure the protection of values other than openness'.[81] Such verification should take place only to such extent as is necessary to determine whether a person fulfils the legal requirements to participate in an open court hearing.[82] Further, 'online third parties' should be the muted participants of court hearings, and courts should have a possibility to exclude a person from a hearing if his or her behaviour is not in line with the seriousness of the court proceedings.[83]

Such technological openness of court hearings may lead to another problem, the one regarding the recording of hearings by third parties.[84] This may be problematic, for example, in the context of witnesses who did not testify so far in a proceeding. Therefore, appropriate technological solutions should be provided to exclude, or at least limit, this risk.[85]

Finally, it may be added that remote access to court hearings should not be abandoned once the pandemic is over, but it should coexist with and supplement traditional, physical hearings. As already indicated, that would probably cause the goals which we try to attain to be better achieved thanks to the open court principle. It is difficult to agree with the statement that 'remote hearings may be experienced as more tiring than in-person hearings'.[86] This author's court experience shows that it is the opposite, not to mention the time saved.

79 See, for example, Art. 264 of the Polish CCP. It may be questioned whether the access of witnesses to a court hearing should be considered within internal or external openness.

80 Similarly, Kościółek 1954. 33. This problem is also indicated in OSCE 2020. 25.

81 Translation by the author. Translated sentence: 'Dopuszczając możliwość zdalnego obserwowania posiedzeń sądowych przez osoby postronne, należy pamiętać również o potrzebie zapewnienia ochrony wartościom innym niż jawność.' Kościółek 2020. 34.

82 Such requirements may be different for different jurisdictions, but, for example, such verification in Poland would require a verification of age.

83 See, for example, Art. 152 § 4 of the Polish CCP, which states that persons who do not respect the dignity of the court may not be present during court activities (original rule: 'Przy czynnościach sądu nie mogą być obecne osoby w stanie nielicującym z powagą sądu').

84 This problem was indicated, for example, by the Oireachtas Library and Research Service 2020. 19–20 and OSCE 2020. 26.

85 The author of this paper is not a technological expert, wherefore he only assumes that it is possible to provide such solutions – for example, to provide access to the hearing on the basis of a software that does not allow recording, maybe to have witnesses in separate online rooms and have them testify during the same hearing, etc.

86 OSCE 2020. 13.

5. Conclusions

The COVID-19 pandemic was a huge challenge for the principle of the openness of civil court proceedings. In many jurisdictions, the existing methods of implementing this openness were found to be inadequate for the new social distancing reality.[87] To protect public health, many regulations or less formal solutions have been introduced, significantly modifying the course of the civil proceedings. From the perspective of the open court principle – which is recognized in international treaties – many such measures may be seen as highly controversial. However, contesting them is not an easy task since such modifications are justified on the grounds of public health, and the temporary nature of them is usually mentioned.[88]

Nonetheless, the considered principle constitutes one of the most important guarantees of a fair trial. We should not give up on it or limit its scope on the basis of a public health excuse,[89] especially in a situation in which new technologies allow us to maintain its core and essence. Court proceedings with possible remote participation are in line with the obligation of social distancing and allow us to realize this principle almost in its fullness. Furthermore, such solutions do not only allow for compliance with the basic principle but may also bring about its enhancement. The remote access of third parties to court proceedings may cause that such goals as citizens' trust in courts and public oversight of courts be better attained in the future. What is more, such solutions bring the courts closer to our current social reality, where more and more issues are handled online, without the physical presence of the persons involved. Therefore, such measures should not be temporary in nature but should stay with us even after the pandemic. If so, the open court principle will not only survive the COVID-19 pandemic but will only become stronger after it.

References

AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS. 1985. *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf (accessed on: 31.08.2021).

87 Cf. Kościółek 1954. 35–36.

88 Similarly, Zembrzuski 2021. 14.

89 '(…) the key standards underpinning the operationalization of the courts must continue even during times of emergency', OSCE 2020. 7. See also CEPEJ 2020.

BRONIEWICZ, W. 1954. Jawność jako konstytucyjna zasada procesu cywilnego Polski Ludowej. *Nowe Prawo* 5–6.

CANADIAN BAR ASSOCIATION. 2020. *Reaching Equal Justice Report: An Invitation to Envision and Act*. November 2013. https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf (accessed on: 31.08.2021).

EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE [CEPEJ]. 2020. *CEPEJ Declaration, Lessons Learnt and Challenges Faced by the Judiciary during and after the COVID-19 Pandemic*. https://rm.coe.int/declaration-en/16809ea1e2 (accessed on: 30.08.2021).

FIELDING, N.–BRAUN, S.–HIEKE, G. 2020. *Video-Enabled Justice Evaluation, Sussex Police and Crime Commissioner and University of Surrey. Final Report Version 11 (March 2020)*. http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf (accessed on: 31.08.2021).

FISCHER, N. 2012. Electronification of Civil Litigation and Civil Justice – The Future of the Traditional Civil Procedure Facing the Electronification. In: *Electronic Technology and Civil Procedure. New Paths to Justice from Around the World*. Heidelberg–New York–London.

HARSAGI, V. 2012. Digital Technology and the Character of Civil Prodecure. In: *Electronic Technology and Civil Procedure. New Paths to Justice from Around the World*. Heidelberg–New York–London.

KOŚCIÓŁEK, A. 2021. Jawność posiedzeń sądowych w postępowaniu cywilnym w dobie pandemii COVID-19. *[WoltersKluwer] OpenLex*. https://sip.lex.pl/komentarze-i-publikacje/artykuly/jawnosc-posiedzen-sadowych-w-postepowaniu-cywilnym-w-dobie-pandemii-151384828 (accessed on: 31.08.2021).

KURCZEWSKA, D. 2021. *Ocena skutków regulacji zawartych w projekcie ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (druk nr 899)*. https://www.sejm.gov.pl/sejm9.nsf/opinieBAS.xsp?nr=899 (accessed on: 31.08.2021).

LITOWSKI, J. 2021. Ograniczenie jawności postępowania cywilnego z uwagi na stan epidemii wywołany wirusem COVID-19. *Monitor Prawniczy* 2.

MISZEWSKI, W. 1933. Jawność w procesie cywilnym w związku z przepisami kodeksu postępowania cywilnego. *Polski Proces Cywilny* 1.

OIREACHTAS LIBRARY & RESEARCH SERVICE. 2020. *L&RS Note, Remote Court Hearings*. https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2020/2020-07-28_l-rs-note-remote-court-hearings_en.pdf (accessed on: 31.08.2021).

ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE [OSCE]. 2020. *The Functioning of Courts in the COVID-19 Pandemic*. https://www.osce.org/odihr/469170 (accessed on: 31.08.2021).

2021. *OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic: Inequality, Discrimination and Marginalization*. https://www.osce.org/odihr/480014 (accessed on: 31.08.2021).

ZEMBRZUSKI, T. 2021. Ograniczenia jawności postępowania w sprawach cywilnych w dobie pandemii – potrzeba chwili czy trwałe rozwiązanie? *Forum Prawnicze* 3.

*** https://justice.org.uk/our-work/justice-covid-19-response/ (accessed on: 31.08.2021).

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Big-Data-Based Legal Analytics Programs. What Will Data-Driven Law Look Like?

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Abstract. Big-data-based legal analytics programs (LAP) appeared in the US in the early 2010s. They work by collecting large amounts of textual data from public databases, usually on websites, refining this data, linking it to other data, and then analysing and presenting it with special software. In this study, I first present the history of LAPs, their different types, key features, and their content and technology fundamentals. In a highlighted example, I also describe their uses through the 'Judge Analyzer' module. I will write later in this section about the upheaval that a judge analyser service has caused in France and the arguments and counterarguments that have been voiced in this debate. In the second part, the study describes the legal uses of LAPs and the related concerns. The study divides the concerns into two groups. The first type of general concern points to the possibility of a limited use of 'data-based law' and 'prediction' in law. The second type of counterargument focuses on the difference between common law and continental legal systems. Finally, the study briefly describes the future of LAPs.

Keywords: big data, data-based legal analytics programs, judge analyser, prediction of case law, France

1. What Are Big-Data-Based Legal Analytics Programs?

The term 'big data' spread in the early 2010s.[1] It marks the process by which more and more data, mainly from the open Internet and the Internet of things, makes it possible to develop new types of analysis, to identify contexts, to draw conclusions, and to make predictions in different areas of life.

The big data phenomenon can best be seen as an approach and narrative that seeks to apply long-established statistical methods to new areas where insufficient

1 Schönberger–Cukier 2013.

data has been available so far, such as to predict customer behaviour in business or the occurrence of certain social phenomena. Big data has also revolutionized the use of artificial intelligence, perhaps its most significant effect. This is because the large amount of data collected in different areas of life also functions as teaching data for applications based on machine learning. In the second half of the 2010s, this brought real breakthroughs in many areas such as machine translation or medical diagnostics based on imaging procedures.

The big data approach soon appeared in the world of law.[2] Many have praised the potential it offers to help legislation (e.g. through 'experimentation' with real-time data and immediate feedback) and jurisprudence (e.g. text mining analysis of court judgments), whether in court, in law offices, or at authorities.[3] The following article analyses a special type of software (mainly operating in the form of an online service) that has been developed mainly to help the work of lawyers in law offices and legal departments. These legal analytics programs (LAPs) can retrieve, display, analyse, and visualize all kind of legal data, extracted from legal documents and databases.

1.1. The History of Legal Analytics Software

In the United States, pilot projects were launched in the mid-2000s to provide a new type of tool for lawyers through innovative aggregation and processing of available open data generated at courts, the patent office, and at other authorities.

The first such analytics program was *Lex Machina*, whose immediate predecessor was developed in collaboration with Stanford Law School and the Stanford Computer Science Department back in 2006.[4] The project was backed by another initiative, the IP (Intellectual Property) Litigation Clearinghouse, which sought to set up a search system for disputes over intellectual property (primarily patents). Intellectual property law is a particularly good area for experimentation because there is a large capital movement around the field, litigation is usually very costly, and cases involve a relatively narrow subject area (domain), so the range of arguments used in them can be well delineated. (It is recalled here that one of the first successful legal expert systems, HYPO, operated in the area of trade secrets, which has similar characteristics.)[5] Lex Machina continued to gather investors and customers until 2015, when it was acquired by LexisNexis.[6]

At the same time, other service providers appeared. Currently, according to the 360Quadrants website,[7] 18 companies offer such services, although their

2 Ződi 2017; Rapoport–Tiano 2019.
3 Katz 2013.
4 Hoge 2013.
5 Ashley 1991.
6 *Lex Machina*. 2015.
7 *360Quadrants: Best Legal Analytics Software*. 2021.

functionality is diverse. In addition to 'general' analysis, there are LAPs that help the process of e-discovery, or legal due diligence. The functionality of these programs is very similar (search, aggregation/visualization, prediction), but instead of processing *public legal documents,* they analyse the client's own documents, though sometimes the data extracted from these are compared with the data in public databases.

LAPs can thus be clearly linked to the massive amount of data that appears on the open Internet and to the Anglo-Saxon legal culture, where litigation (and every legal process, even a pre-contractual negotiation) is perceived as a cognitive, argumentative battle in which the party with more information and insight wins.

1.2. Technology and Functions

LAPs use legal documents as raw data. Documents, as I mentioned above, can be public documents from public databases or the user's own documents. Lex Machina, for example, is currently using four data sources: PACER (Public Access to Court Electronic Records), EDIS (Electronic Document Information System of the International Trade Commission), US PTO (Patent Office – database), and dockets of some county courts.[8] The former are collected by most service providers by web scraping technologies[9] (bulk downloads), but direct data transfer by individual data providers is also not excluded. Several techniques are then used in the texts to extract data and information from them. The most frequently used of these information extraction technologies is the so-called RegEx (Regular Expression) and Named Entity Recognition.[10] The former is essentially data recognition of certain character patterns (strings) described by rules. The system finds the strings defined in the rules (e.g. legal references in a legal document) and then indexes them. NER can be understood as a subset of the RegEx method, where, from unstructured or partially structured texts, *names* (in a broad sense), i.e. 'rigid markers' (personal names, institution names, place names, etc.), and numerical data (date, amount of money, or other entities) are captured and stored. The ultimate goal of both methods is to extract structured information from partly or entirely unstructured corpuses of texts. The services and functions of LAPs are then based on this data.

The functions of LAPs can be divided into three groups: search, aggregation/visualization, and predictive functions.

Firstly, all systems have 'traditional' search features. Due to the rich set of metadata (the wide variety of extracted data), these systems usually allow much more accurate, complex searches than systems that search simply in the full text or

8 *Lex Machina – How It Works?* 2021.
9 Mitchell 2018.
10 Zhang et al. 2018, Csányi et al. 2021.

based on a few simple parameters. Another feature is that, unlike general Internet search engines, they allow a wide range of pre-sets for various metadata/parameters (so-called parametric search) when searching. In general web search engines, there is usually only one search box in the main interface, and the search engine tries to 'figure out' what the searcher's intention is, because it can be very different for the same search string. In this respect, the handbook for Google search testers is interesting and instructive because it takes into account the user's personal information and search history. For example, if a user enters the word 'apple', the search engine takes Apple Inc. as the 'dominant interpretation' and treats the 'fruit' result only as a 'common' search intent. However, professional search engines work differently because they only consider the search string and cannot measure the user intent. Different metadata are meant to 'express' user intent. In this sense, LAPs' search engines are so-called 'vertical or topical search engines'.

Another function of the systems is the aggregation/statistics function. This provides much more than the result list of traditional search engines because it does not return information items (e.g. legislation or court judgments, i.e. documents) as a result of a search but data items extracted from the records, and it can display them in a predefined format. The most spectacular of these aggregation functions, and, of course, the most controversial one, is the one that summarizes the data in a system related to a judge, which I will discuss in detail below. But aggregation can, of course, be made for any other data. For example, in the case of a database containing court decisions, the data of a law firm, a court, or a client (company) can be aggregated and presented. Thus, the success rate of the law firm, the list of lawyers acting on behalf of the law firm, the list of clients of the law firm, the 'relationship' between the firm and a judge, and so on, can be displayed. Similarly, it is possible to put a particular court at the centre of the inquiry: for example, the frequency of a particular type of case, the average length of cases, and the length of each stage of the proceedings (pre-litigation, first instance, second instance, etc.) can be also scrutinized.

In the same way, data collection and display can be performed for a group of documents, e.g. a specific narrower area of law; for example, for matters relating to tenancies, this group might include: who acts in these cases, how long the procedure lasts, with what result the procedure typically ends (whether the tenant or the landlord typically wins), and much more. In essence, all the data that can be extracted can be shown together with all the other data. This in itself is not very innovative, as, for example, the essence of relational databases is that any data can be queried in conjunction with any other data – what is innovative about these systems is that they extract and organize data that was previously only available in an unstructured form, so that it can be queried. Of course, not only can the system present data in the form of simple lists and tables, but it can also visualize it in a variety of ways. This can be a simple diagram, but it can also

take other spectacular forms: a Gantt-chart-like form, a table, a network graph, a heatmap, and so on.

1.3. The Predictive Function of LAPs

The third and most controversial function of LAPs is the prediction function, where it is possible to select which case we want to make a 'prediction' for on the basis of several parameters. Incidentally, in many cases, the prediction is functionally nothing more than the classification of documents (the system classifies the document into a kind of decision type), but sometimes a prediction takes the form of a probability of winning/losing a case in percentage format. To be able to imagine prediction based on document grouping, it is worth recalling a famous experiment that is still one of the most cited in the subject.

Here, Aletras et al.[11] processed the judgments of the European Court of Human Rights, including Article 3 (prohibition of torture and inhuman and degrading treatment), 6 (right to a fair trial), and 8 (a right to respect for one's 'private and family life, his/her home, and his/her correspondence'), as interpreted by a large number of judgments. (250, 80, and 254 judgments, respectively, were available for these three articles at the time of writing.) All the judgments were then downloaded and cut up along the subheadings of the judgment, i.e. the texts were separated from each other.

The problem of predicting the decisions of the ECtHR was defined in the paper as a binary classification task. An equal number of cases ruling a violation of the Convention and not finding a violation were then selected. Information referring to the outcome of the sentence (violated / did not violate) was removed from each judgment, and the text was 'stripped down' using RegEx and highlighting stop words (waste words such as adjectives, conjunctions, etc.).

From all parts of the judgments thus stripped (remember, judgments by subheadings, e.g. facts, litigation history, etc.), information was obtained by two natural language processing methods. On the one hand, the so-called bag of words model (BOW) was adopted, i.e. word co-occurrence frequencies were searched and stored without any grammatical and syntactic features. 2,000 so-called n-grams were found and counted, each for each part of the judgment (n-gram is a specific word group, expression, or phrase). On the other hand, the so-called topic model was used, formed by grouping n-grams.

The actual prediction was made by SVM (Support Vector Machine). The essence of SVM is that from certain linguistic features (in this case, the previously formed n-grams and topics) they form a vector in a multidimensional space, thus representing the meaning of the text. In order for a machine to predict based on a 'similar meaning' (the distance of vectors relative to each other), a set of

11 Aletras et al. 2016.

judgments must be used to teach what the final outcome will be. For this, the machine is given a set of judgments in which the final result is also told. (This is called training data.) Then, the machine was asked about another set of data to make a prediction, that is, to classify the judgment deprived of its end result in one of the groups, based on the use of words. The end result of the experiment was that the machine was able to predict the result with roughly 80% accuracy, relying mainly on the text of the factual description and legal argument.

The further results of the experiment are not relevant here, I have only described it in order to get an idea of how a prediction works in a given application. As we can see, the prediction can be of two types, percentage or binary. Percentage prediction differs from the above method in that it places a given text on a scale of 0 to 1, thus expressing the chances of a lawsuit or a motion being successful. Systems also differ in the way they predict. In some systems, only the parameters can be set (e.g. 'I am a defendant in a trademark lawsuit, before Y court, Q judge, and I want to file an X-type of motion, what is the chance of being accepted?' – such as the *Motion analyser* functions in the *Premonition* LAP[12]). Here the system does not actually make a prediction but shows a percentage distribution based on the parameter set. ('For this type of application in this type of lawsuit, the success rate before this judge is 65%.') The other type is when they show a text pattern ('a fact') to the machine. In practical applications, this is usually part of e-discovery software, and it is not the main function of the system but the exploration of all documents related to a given case on the client's servers, correspondence, etc. In this case, the software performs the same sequence of actions that we saw in Aletras et al. This thus allows the quite surreal function in these systems to be able to make an estimate of the chances of litigation based on the set of documents found.

1.4. The 'Judge Analyser' and Its Public Reception

Judge analysers do nothing more than show the data collection extracted from the documents for a judge, that is, using the judge as a query. It is easy to see that the greater the granularity of the documents, i.e. the more data they can extract from them, the larger the 'data sheet' they can compile from a judge.

Even in legal systems where only judgments are available as public documents, a wealth of data can be extracted. This data can be divided into three groups:

– *procedural and technical* details of the case (case number, dates, related judgments and appeals, identity of the trial court, co-judges, members of the panel, other dates and names – names of the parties and their representatives, possibly other parties involved in the case);

12 *Motion Analyzer by Premoniton.ai*. 2021.

– *content-oriented (meta-)data* such as the subject of the case or the larger area of law, the direction of the decision according to the litigation roles (plaintiff–defendant) or according to the substantive legal roles in the decision (e.g. landlord–tenant), references to legislation and case law, including quasi-normative documents, such as judgments of the domestic Constitutional Court or the European Court of Human Rights, the direction of the judgment on appeal – upholding, annulling, altering, etc.);

– *data generated by other, more sophisticated NLP methods* (BOW, or other data – see above – highlighted data, word-to-word occurrences, etc., from which text style, unique features, or other things can be inferred).

From this data, a profile can then be compiled that provides quite a lot of information about the judge even without further inferences. For example, the judge's previous 'portfolio', what cases s/he has heard, in what courts s/he has worked, other professionals s/he has 'relations' with, and what cases s/he has tried can all be seen. Further, the success rate of her cases in higher courts, the most frequently cited sources of law, including precedents, and what roles s/he prefers in her judgements, e.g. whether s/he favours landlords or tenants, banks or debtors, could be revealed. Of course, all this can be generated for individual judges, or as an average for the whole court.

The judge analyser does not enjoy universal popularity even in those Anglo-Saxon countries where the publicity of court hearings and judgments is much more accepted, and the analysis of judges' judgments, subsequent citations,[13] or even their political leaning[14] is part of the legal culture. No wonder, then, that when the first such service appeared in France, it almost immediately caused a storm.

In July 2019, several legal technology portals dramatically reported that in France the 'profiling of judges' had been banned, and 'data scientists had been fired from the courts',[15] thereby significantly reducing the transparency of courts.[16] The owner of the best-known French company for data-based legal analysis (Predictice) called the decision a 'shame for democracy'.[17]

The legislation, passed by the French parliament back in the spring,[18] was enacted as part of judicial reforms and, of course, was not just about banning, but about the publication of, essentially all the French court judgments in an anonymized form on the World Wide Web. However, at the same time the decision was published, a rule was introduced that data contained in published documents may not be used to 'evaluate, analyse, and compare' the work of

13 Kosma 1998.
14 Lim 2000.
15 Taylor 2019.
16 McGinnis 2019.
17 Tashea 2019.
18 LOI n° 2019-222 du 23 mars 2019. 2019.

judges and court staff. Violators of the rule would be punished for the crime of 'misuse of personal data' of the French Criminal Code.[19]

An article published on the Vervassungsblog[20] suggests a previous case lay behind the stricter approach: in 2016, a lawyer-engineer named Michaël Benesty published an article on the asylum practice of French courts based on data analysis and machine learning. It turned out that there were no justifiable differences between the judgments of individual courts and judges.[21] The French courts reacted quickly, partly by denying the charges and partly by questioning Benesty's methodology.

Of course, there were also defenders of the new legislation.[22] A law professor at the University of Lorraine, for example, argued that the reaction of the Anglo-Saxon press was a simple misunderstanding and stemmed from the difference between common law and French law. In France, judges do not pass judgment in their own name but in the name of the republic, and to this day they cling to the fiction of logical syllogism (a necessary conclusion). In addition, judges in many cases sit in chambers, within which we cannot see the position of individual judges. Therefore, the profile of judges is difficult to establish and can be very distorting. Finally, as the law only prohibited the analysis, comparison, and ranking of judges and court staff by name, other data-based analytics are still possible. Judgments, groups of judgments from different perspectives, courts, and even chambers can still be analysed and compared. Predictions can still be made about the possible future outcomes of cases.

2. Opportunities and Concerns about Big Data Analytics in Law. The Future of Analytics

The French case illustrates the dilemmas of data-based legal analysis: these have been on the agenda almost constantly since the big data narrative appeared in law. Of these, there are concerns that are general and independent of the legal system and some that explicitly imply that this software type is tied to the common law legal culture. I will examine these two sets of arguments below. However, before turning to the concerns, I will briefly recapitulate the arguments of proponents of data-based law, relying on Daniel Martin Katz's much-cited article.[23]

19 Code pénal Article 226-18.
20 Langford–Madsen 2019.
21 Benesty 2016.
22 G'Sell 2019.
23 Katz 2013.

2.1. Benefits of Big-Data-Driven Law

Katz's starting point is that the legal professions, especially the work of attorneys, have a wealth of predictive elements. Do we have a chance in this matter? How will the court judge? How much will this cost me? What are the risks of this or that contractual provision being left out of the contract? A lawyer should be able to answer all of these questions on a daily basis, but s/he can only rely on his or her own past experience and intuition. However, there are no such limitations to data-driven analysis. It can analyse almost every relevant judgment in a field of law and analyse an amount of data that a person is incapable of. It is unbiased and tireless.[24]

Katz first examines the costs of litigation. He gives an example of the TyMetrix system,[25] where the data on lawsuits in each area of law can be used to query what legal costs can be expected. Another example is the possibility to compare the effectiveness of lawyers.[26] This can be obtained from the litigation data: it is clear who the attorney was and whether or not s/he won the lawsuit. And, finally, of course, the most important thing is that the outcome of the cases can be predicted with considerable accuracy, Katz says. It analyses predictive systems in three areas: the U.S. Supreme Court, the Patent Court, and securities fraud class action on capital market fraud.

It is also interesting to take a closer look at an experiment conducted on the judgements of the U.S. Supreme Court in 2002.[27] Here the authors predicted the outcome of all of the 2002 Supreme Court judgments automatically from a variety of case-derived variables. A group of expert lawyers was used as a control group. The machine achieved 75% accuracy, while the expert control group achieved 59%. Machine prediction projected variables extracted from past data (such as the subject matter of the case and the political orientation of the judge) into the present judgments and made predictions based on them. What is astonishing is that the 'subject matter', the facts, and the legal arguments of the case did not play a role in this model. The machine predicted much better than experts based on six simple and not 'legal-professional' variables, such as circuit of origin, issue area of the case, type of petitioner (e.g. the United States, an employer, etc.), type of respondent, ideological direction (liberal or conservative) of the lower court ruling, and whether the petitioner argued that a law or practice is unconstitutional.[28]

24 Katz 2013. 928.

25 TyMetrix is a SaaS (Software as a Service) e-invoicing and business management solution that has a prediction module. The system is currently owned by Wolters Kluwer. https://www.wolterskluwer.com/en/solutions/enterprise-legal-management/tymetrix-360/modules.

26 Premonition has a module with this function.

27 Ruger et al. 2004.

28 Ruger et al. 2004. 1163.

2.2. General Concerns

According to Devins et al.,[29] three arguments can be made in the field of law regarding big-data-based analyses.

The first argument is that no dataset and data analysis or conclusion that seems to be the most objective can be completely 'objective' and 'value-neutral' as such services often claim to be. On the one hand, all observations are 'theory-laden', especially in complex systems such as law. So, it already requires a preliminary theory of what data we collect at all. On the other hand, the interpretation of the data requires further theory, framing, value choices, and thus a series of moments from which it loses its objectivity. To this argument, we can add that the theories are laden with values, and it is especially characteristic that values and their legal precipitations and principles are contradictory. In practice, this means for these big data applications that the same language pattern or dataset, due to both its theoretical framing and its embedding in some value context, can lead to completely different results that may not be perceived by the machine.

The second argument against big-data-based law is that its ultimate virtue, its predictive power is simply illusory and virtually useless. Law is not a deterministic system and, moreover, is constantly subject to change. There are always actors who take unexpected steps, or apply unexpected reasoning that can lead to success. And the percentage probability says nothing about the prospects for a particular case, as it is not based on causation. And in law, causal relationships play a major role.

This argument actually contains two arguments as follows:

The first half of the argument is that legal proceedings are cognitive struggles, linguistic 'battles' that are not limited to specific data in the battle, legal references, and so on, but they also involve the convincing power of all this, i.e. it is the quality of the legal argument that counts. This is true for two types of legal arguments: arguments connected to the interpretation of the law on the one hand and those related to the 'construction' of the facts on the other. Both areas leave a lot of room for skills in reasoning. This is also the reason why the explanation of an algorithmic output and the explanation of a legal decision, that is, legal reasoning, are so dramatically different.[30] The proper narration and presentation of facts, including the embedding of these in our ordinary narratives, play a very important role in legal reasoning, as does the interpretation of the 'open texture' of legislation.[31] In fact, the legal decision is the proper mixture of these two operations (storytelling and interpretation) *in relation to each other*. However, machine analyses are based on hard facts and hard rules. Facts are not narratives

29 Devins et al. 2017.
30 Ződi 2022.
31 Hart 1961. 124.

but only data, and rules are not human texts written in ordinary language – which can be interpreted in multiple ways – but algorithms.

The second half of the argument also contains a philosophical (though not epistemological but ontological) argument, namely that statistical relationships (e.g. correlation) that work with probabilistic relationships do not work well in law because law always deals with individual cases and is not interested in statistical correlations. How did it happen in this particular case? – asks the lawyer. And the fact that the parties lose 90% of a particular case type says nothing about whether or not I will be among the 10%.

Finally, the third argument Devins and co-authors make against data-based law is that its application in certain areas can be particularly dangerous. Here we read the well-known concerns about discrimination 'encoded' in algorithms and data and that big-data-based thinking would undermine the main source of innovation as data-based law always relies only on the past.

2.3. Concerns over Differences between Common Law and Civil Law

LAPs were invented in the Anglo-Saxon area. It is much more difficult to set up and run such services on the continent not only because the underlying legal culture is different but also because there is not as much data (documents, records) available as in the US. As I have already indicated in the description of the Lex Machina system, it processes the files in the PACER system. This means (except in cases where a sealing order has been requested or the documents are not public due to the nature of the case) that the entire file is open: with the submissions of the parties, minutes of negotiations, expert opinions, and so on. It is easy to see how much more information can be extracted from these records than from anonymized judgments, which is typically the only publicly available data source in civil law legal systems. It should be added that in a number of countries it is even not the complete set of judgments that is published, nor even a representative one, but a small fraction of it – as is the case in Hungary.

The system of data protection is also completely different in the two cultures. Data protection standards are much higher in Europe. If we look only at the simple fact that in common law systems the case is named using the names of the parties, one can immediately see the difference between the two legal cultures. In addition, existing and legitimate data protection barriers are sometimes hampered by almost incomprehensible additional barriers such as the rule that in business litigation company names should also be removed from judgments (as in Hungary), although companies are clearly not protected by the data protection provisions.

Perhaps more importantly, one of the main uses of U.S. systems is forum shopping, meaning that the parties decide where to initiate proceedings in the

light of statistics and data. This is not possible in most continental jurisdictions due to strict rules regarding the distribution of cases at territorial and institutional levels. At the same time, as we read in the introduction to this volume, there is a competition between the world's legal systems, independent of forum shopping, and data-driven analysis also sheds new light on the issue of forum choice.

But the cultural difference is even more significant. In the French judge analyser debate, it was an important argument that the judge is delivering an impersonal decision, based on logic. This idea has deep roots in French legal culture. In contrast, in common law systems, it has always been part of the legal culture that the law is fundamentally a rhetorical performance, which excludes the syllogistic model.

2.4. Quo Vadis LAPs?

The reception of the French ban, and the public upheaval around it, has shown that even a partial restriction is not a viable option: if there is data, these services, including judicial profiling, will continue to be with us, at most 'at home, between the four walls' of those who hope to gain an advantage in a proceeding. Of course, this can be handled sceptically or with sad indulgence, but it is much better to look more at the benefits and what these services can be used for and what they should not be used for.

Most importantly, opponents of the services seem to be confusing two things: big-data-based legal decision-making and big-data-based decision support. From the fact that a judge or a system cannot decide on a statistical basis, why should a lawyer not look at the statistics of a judge, or a field of law, or collect and analyse the main arguments and the directions of the judgment? This first more general conclusion can therefore be formulated in such a way that big-data-based LAPs can indeed have a raison d'être as an element of the work of a lawyer.

Judges can also benefit from LAPs, as they can gather information about themselves that would otherwise come from public databases, and this may help them to identify their own bad instincts, previously unrecognized habits, stereotypical vocabulary, and so on, and improve on them.

LAPs also help to reveal the inconsistencies in judicial practice. Many argue that no two cases are the same, and 'there is certainly a reason' if a judge decides otherwise in a seemingly similar case. At the same time, it should be seen that such inequalities, which may be apparent but potentially real, also become apparent more easily through machine analysis. And then what we do with the data brought to the surface is up to us.

Foreseeing the future and making better decisions based on it is, of course, the ultimate goal, but it can also be a closer goal to simply better understand certain phenomena based on 'hard facts'. If we see all the information about a judge that

can be read from his or her judgments, we get a much more nuanced picture of them, even if we do not want to make predictions about a particular case. An overview and understanding of the judicial practice in a field of law is greatly aided by seeing the length of lawsuits, which judges are the most influential in the field, the proportion of first-instance judgments upheld in the second instance, and so on. Data-based analysis can be especially helpful for doctrinal scholarship, being a control tool of doctrinal theories.

Most providers (including Premonition, for example) argue that anyone who uses such systems will gain an advantage in legal cognitive combat. However, this benefit only lasts until the other party subscribes to the same service. That is why it is also worth wasting a few words on what the legal system and legal practice will look like when this data is available to everyone. It is worth dividing this question into two parts; on the one hand, the data that show an aggregate picture of a bulk of documents (e.g. a group of judgements or a court), and the conclusions drawn from them, and, on the other hand, the data that show the performance or professional background of *people* (judges, attorneys, or parties involved in litigation).

The first type – non-personal data – will, in my view, work primarily to promote out-of-court settlements by predicting the prospects for litigation. There are already indications of this type of usage: due to the predicted legal costs, large companies already use the forecasts of their legal advisers or lawyers, often expressed as a percentage (e.g. to create a provision of the potential cost of losing a lawsuit or to calculate the amount offered in an out-of-court settlement). Arguments presented systematically in an aggregated form can be a useful aid to a lawyer in relatively simple cases to develop a tactic or, if they represent a statistically 'losing' side, to develop new arguments. For this reason, LAPs do not necessarily stifle legal innovation as an 'aggregated past' because by systematically presenting case law, they can even help improve legal innovation.

The situation is different with the analysis of legal representatives and judges. Calculating and showing a 'win rate' can have a very serious prestige-harming effect on a lawyer, so in this area some kind of restriction or regulation is desirable. (As is the case for credit ratings.) In my view, uniform methods will be developed soon for collecting and processing information about legal professionals, and these methods will be increasingly transparent. I do not even rule out the possibility of prescribing at the legislative level how to calculate a lawyer's win rate, what other information should be provided in this regard, and in which situations these indicators cannot be used. (For example, if there is not enough data.) Judges will be aware of their own profile, and if it is not to their liking, they will act against it, by consciously moving against their own data-based image. (If, for example, the assessment is that 'this judge always decides in favour of the banks', then s/he can pay more attention to making this evaluation

more balanced.) What is certain, however, is that the charm of the novelty of these services will soon fade and will blend into the everyday life of traditional law, as has been the case with computer-aided legal research, e-discovery tools, or the other technical novelties of recent years.

References

ALETRAS, N.–TSARAPATSANIS, D.–PREOȚIUC-PIETRO, D.–LAMPOS, V. 2016. Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective. *PeerJ Computer Science* 2: e93. https://doi.org/10.7717/peerj-cs.93 (accessed on: 22.10.2021).

ASHLEY, K. D. 1991. Reasoning with Cases and Hypotheticals in HYPO. *International Journal of Man–Machine Studies* 34: 753–796.

BENESTY, M. 2016. L'Impartialité de certains juges mise á mal par l'intelligence artificielle. *village-justice.com* – https://www.village-justice.com/articles/impartialite-certains-juges-mise,21760.html (accessed on: 22.10.2021).

CSÁNYI, G. M.–NAGY, D.–VÁGI, R.–VADÁSZ, J. P.–OROSZ, T. 2021. Challenges and Open Problems of Legal Document Anonymization. *Symmetry* 13: 1490. https://doi.org/10.3390/sym13081490 (accessed on: 22.10.2021).

DEVINS, C.–FELIN, T.–KAUFMANN, S.–KOPPL, R. 2017. The Law and Big Data. *Cornell Journal of Law and Public Policy* 27: 357–414.

G'SELL, F. 2019 Predicting Courts' Decisions Is Lawful in France and Will Remain So. *actualitesdudroit.fr*. – https://www.actualitesdudroit.fr/browse/tech-droit/donnees/22630/predicting-courts-decisions-is-lawful-in-france-and-will-remain-so (accessed on: 22.10.2021).

HART, H. L. A. 1961. *The Concept of Law*. Oxford.

HOGE, P. 2013. Lex Machina: 'Moneyball' Meets Patent Lawsuits. *San Francisco Business Times* 13.09.2013. https://www.bizjournals.com/sanfrancisco/blog/2013/09/lex-machina-mines-lawsuit-data.html?page=all (accessed on: 22.10.2021).

KATZ, D. M. 2013. Quantitative Legal Prediction – or – How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry. *Emory Law Journal* 62: 909–966.

KOSMA, M. N. 1998. Measuring the Influence of Supreme Court Justices. *Journal of Legal Studies* 27: 333–372.

LANGFORD, M.–MADSEN, M. 2019. France Criminalises Research on Judges. *vervassungsblog.de* 12.06.2019. https://verfassungsblog.de/france-criminalises-research-on-judges/ (accessed on: 22.10.2021).

LIM, Y. 2000. An Empirical Analysis of Supreme Court Justices' Decision Making. *Journal of Legal Studies* 29: 721–752.

MCGINNIS, J. O. 2019. Transparency and the Law in France. *lawliberty.org* https://www.lawliberty.org/2019/06/20/transparency-and-the-law-in-france/ (accessed on: 22.10.2021).

MITCHELL, R. 2018. *Web Scraping with Python*. Sebastpol (USA).

RAPOPORT, N. B.–TIANO, T. R. Jr. 2019. Legal Analytics, Social Science, and Legal Fees: Reimagining Legal Spend Decisions in an Evolving Industry. *Georgia State University Law Review* 35: 1269–1304.

RUGER, T. W.–KIM, P. T.–MARTIN, A. D.–QUINN, K. M. 2004. The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision Making. *Columbia Law Review* 104: 1150.

SCHÖNBERGER, M. V.–CUKIER, K. 2013. *Big Data. The Essential Guide to Work, Life, Learning in the Age of Insight*. London.

TASHEA, J. 2019. France Bans Publishing of Judicial Analytics and Prompts Criminal Penalty. *abajornal.com* – http://www.abajournal.com/news/article/france-bans-and-creates-criminal-penalty-for-judicial-analytics (accessed on: 22.10.2021).

TAYLOR, S. 2019. French Data Analytics Law Won't Stop Analytics, Attorneys Say. *law.com* 07.06.2019. https://www.law.com/legaltechnews/2019/06/07/french-data-analytics-law-wont-stop-analytics-397-21251/?slreturn=20191006132927 (accessed on: 22.10.2021).

ZHANG, S.–HE, L.–VUCETIC, S.–DRAGUT, E. C. 2018. Regular Expression Guided Entity Mention Mining from Noisy Web Data. *Proceedings of the 2018 Conference on Empirical Methods in Natural Language Processing* (Brussels): 1991–2000.

ZŐDI, ZS. 2017. Law and Legal Science in the Age of Big Data. *Intersections. East European Journal of Society and Politics* 3: 69–87.

2022. *Algorithmic Explainability and Legal Reasoning. The Theory and Practice of Legislation*. https://doi.org/10.1080/20508840.2022.2033945 (accessed on: 05.01.2022).

*** *360Quadrants: Best Legal Analytics Software*. 2021. https://www.360quadrants.com/software/legal-analytics-market (accessed on: 22.10.2021).

*** *Code pénal Article 226-18*. https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006417968&cidTexte=LEGITEXT000006070719 (accessed on: 22.10.2021).

*** *Lex Machina*. 2015. LexisNexis Acquires Premier Legal Analytics Provider. 11.23.2015. https://lexmachina.com/media/press/lexisnexis-acquires-lex-machina/ (accessed on: 22.10.2021).

*** *Lex Machina – How It Works?* 2021. https://lexmachina.com/how-it-works/ (accessed on: 22.10.2021).

*** *LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice Article 33*. 2019. https://www.legifrance.gouv.fr/eli/loi/2019/3/23/2019-222/jo/article_33 (accessed on: 22.10.2021).

*** *Motion Analyzer by Premoniton.ai*. 2021. https://premonition.ai/legal_analytics/#motions (accessed on: 22.10.2021).

*** *TyMetrix*. https://www.wolterskluwer.com/en/solutions/enterprise-legal-management/tymetrix-360/modules (accessed on: 22.10.2021).

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