

AZ ÁLLAM ÉS JOG DIGITÁLIS KÖRNYEZETE A 21. SZÁZADBAN

Szerkesztette
Fejes Zsuzsanna



Szegedi Jogász Doktorandusz Konferenciák XII.

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A 21. SZÁZADBAN

Szegedi Jogász Doktorandusz Konferenciák XII.

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Szegedi Tudományegyetem
Állam- és Jogtudományi Doktori Iskola
Kiadványsorozata

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Szeged
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Megjelent a Szegedi Tudományegyetem
Állam- és Jogtudományi Doktori Iskolájának és az
Igazságügyi Minisztérium jogászképzés színvonalának
támogatását célzó programjának a támogatásával.

Kötetszerkesztő
Fejes Zsuzsanna

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Kovács Ildikó

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ELŐSZÓ

A Szegedi Tudományegyetem Állam- és Jogtudományi Doktori Iskolája 2022. május 13-án rendezte meg a hagyományos éves doktorandusz konferenciáját „*Az állam és jog digitális környezete a 21. században*” címmel.

Az Igazságügyi Minisztérium jogászképzés színvonalának emelését célzó programjának segítségével megvalósuló rendezvénynek ezúttal is a Coospace BBB felülete adott otthont.

A szakmai program Prof. Dr. Blutman László, a Doktori Iskola vezetőjének megnyitójával kezdődött, aki gyakorlati példákon keresztül hívta fel a figyelmet arra, hogy az állam és a jog digitális környezetével összefüggő új folyamatok és jelenségek hogyan képesek előidézni egy új, átmeneti, és bizonytalan szabályozási környezetet. Ebből következően a kutatási lehetőségek szinte határtalanok az új doktorandusz generáció számára. Az iskolavezető hangsúlyozta, hogy a konferencia résztvevői, a lelkes és fiatal kutatók érdekes kihívások előtt állnak, rajtuk múlik, hogy ezeket az új, sokszorosan felvetődő problémákat hogyan használják ki önálló gondolkodásra és saját kutatási céljaikra.

A megnyitót követően a konferencia három szekcióban folytatódott. Az első platform a magyar anyanyelvű doktori hallgatók számára biztosított lehetőséget magyar és angol nyelven, hogy bemutassák kutatási eredményeiket. A második és harmadik szekcióban a külföldi doktoranduszok adhatták elő kutatási témájukat angol nyelven.

A rendezvény kiváló lehetőséget nyújtott a 21. század új kihívásainak, az állam és a jog, valamint a digitalizáció viszonyának vizsgálatára, hogy ezáltal gazdagítsa a résztvevők tudományos és szakmai ismereteit, szélesítse a fiatal kutatók látókörét.

A konferencia anyagát összefoglaló jelen kötet első része tartalmazza az egyes szekciók magyar és angol nyelvű előadásainak absztraktjait, a második részben pedig az előadások alapján készült, válogatott tanulmányok olvashatók.

A konferencia az Igazságügyi Minisztérium támogatásával, a jogászképzés színvonalának emelését célzó programjai keretében valósult meg.

Szeged, 2022. július

A Szervezők

A KONFERENCIA ABSZTRAKTJAI

1. MAGYAR NYELVŰ ELŐADÁSOK ABSZTRAKTJAI

ONLINE VÉLEMÉNYNYILVÁNÍTÁS –
KÜLÖNÖS TEKINTETTEL RÉMHÍRTERJESZTÉSRE

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Az internetnek köszönhetően mindenki szabadon kifejezheti véleményét a közösségi portálokon. A véleménynyilvánítási szabadság kitüntetett szerepéből adódóan, amennyiben a szólás a közügyeket érinti, a korlátozás igen szűk körben megengedett. Előadásomban a köznyugalmat sértő, kollektív jogi tárgyjal rendelkező és verbálisan elkövethető azon deliktumokat vizsgálom, amelyek a véleményszabadságot korlátozzák, különös tekintettel a rémhírterjesztésre. A rémhírterjesztés joggyakorlatáról 2020 előtt gyakorlatilag nem beszélhettünk, ugyanis az egyik legritkábban előforduló bűncselekménynek számított. A koronavírus-járványnak köszönhetően a jogalkotó új életet lehelt a tényállásba. A módosítás új bekezdéssel bővítette a tényállást, aminek következtében számos eljárás indult rémhírterjesztés miatt.

Előadásomban vizsgálom a témában született két alkotmánybírói határozatot [18/2000. (VI. 6.) AB határozat; 15/2020. (VII. 8.) AB határozat], valamint azt, hogy milyen következményei vannak, ha az elkövetőt az interneten közzétett szólás miatt vonják felelőségre. A digitalizáció miatt felmerült kérdésként, hogy külföldön közzétett szólás esetén indítható-e rémhírterjesztés miatt büntetőeljárás?

A vonatkozó joggyakorlat értelmében az elhangzott szólást mindig a szöveg kontextusában kell vizsgálni, hogy adekvát módon el lehessen határozni a tényállítást-értéktételeket. Az Emberi Jogok Európai Bírósága azonban kidolgozott egy harmadik kategóriát (tényalapú értéktételeket), hogy segítse annak eldöntését, hogy a szólás tényállításnak vagy értéktételeknek minősül-e. Ennek következtében indokolt megvizsgálni a tényalapú értéktételek problematikáját is.

Kulcsszavak: véleménynyilvánítás, büntetőjog, alkotmánybírói határozat, alkotmányos büntetőjog, rémhírterjesztés

A COVID-19 ÉS A DIGITÁLIS BEBÖRTÖNZÉS

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A digitális bebörtönzést (e-carceration) már bevett fogalomként használják az amerikai büntetőjog területén az elektronikus felügyelet széleskörű, már-már káros mértékben elterjedt alkalmazására. Európában ennél jobb a helyzet, mivel az Európa Tanács még 2014-ben fontos jogi garanciákat határozott meg az elektronikus felügyeletről szóló ajánlásában. A COVID-19 járvány azonban nem várt kihívások elé állította az egész világot, így az egyes országok büntetés-végrehajtási szervezetét is. Erre válaszul a legtöbb európai állam igyekezett alternatívákat keresni, amelyek hatékonyan csökkenthetik a börtönépességet, így megelőzve a járvány intenzív terjedését a fogvatartottak körében. Ilyen alternatívát jelentett az elektronikus felügyelet is, amelyet sok ország vagy bevezetett a büntetés-végrehajtás területére, vagy éppen kibővítette annak alkalmazási feltételeit.

Előadásomban ennek vizsgálatára térek ki, górcső alá véve, hogy melyek voltak az ehhez kötődő intézkedések az egyes európai államokban, illetve, hogy ezek milyen változásokat eredményeztek a büntetőjog területén. Ennek vizsgálata és konzekvenciái azért is fontosak, mert jogosan számíthatunk arra, hogy a járvány okozta újítások velük maradnak, vagy éppen szélesebb teret nyernek abból adódóan, hogy olcsóbbnak és könnyebben végrehajthatónak bizonyulnak a „klasszikus” bebörtönzésnél. Fontos azonban látnunk, hogy az előnyök mellett, a digitális bebörtönzésnek számos hátránya is könnyedén azonosítható, amelyeket előadásomban fogok cizellálni, és ezzel együtt potenciális javaslatokat is megfogalmazok a megfelelő korlátok és garanciák felállítására.

Kulcsszavak: elektronikus felügyelet, digitális bebörtönzés, COVID-19 járvány, túlszűfolttság, alternatív szankciók

AZ ELEKTRONIKUS ÜGYINTÉZÉS TENDENCIÁI A KÖZIGAZGATÁS HELYI SZINTJÉN

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Magyarországon az utóbbi évtizedben számos, a közigazgatási elektronikus ügyintézés fejlesztésére irányuló intézkedésnek lehettünk tanúi. A jogi környezet változása és a technológiai fejlesztések következtében az elektronikus ügyintézés egyre inkább elérhetővé vált minden polgár számára. Különösen jelentős fejlődésnek lehettünk tanúi az elmúlt években a Magyarországon az utóbbi évtized centralizációs törekvései ellenére is meghatározó szereppel bíró helyi önkormányzatok vonatkozásában.

Noha a rendelkezésünkre álló információk alapján az elektronikus ügyintézés igénybevétele a központi közigazgatásban egyértelműen meghonosodott, az önkormányzatok terén még nem rendelkezünk elegendő számszerűsíthető adattal.

Az központilag üzemeltetett önkormányzati elektronikus ügyintézési rendszer általánosan éppen a COVID-19 megjelenését egy évvel megelőzően került országos kiépítésre. A pandémia megfékezésére irányuló korlátozások az általános vélekedések szerint pozitívan kellett, hogy hassanak az e-ügyintézés minél szélesebb körű igénybevételére.

Tanulmányomban ennek a hipotézisnek az igazolására teszek kísérletet a rendelkezésre álló adatbázisok és saját, közel kétszáz önkormányzat bevonásával végzett primer felmérésem alapján.

Az előadásom tárgyát képező kutatás az ÚNKP támogatásával valósul meg. A konferencián az eddigi részeredmények bemutatása a célom.

Kulcsszavak: e-közigazgatás, önkormányzatok, e-ügyintézés

ELEKTRONIKUS SZAVAZÁS MAGYARORSZÁGON
– MIÉRT NINCS, HA LEHETNE?

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Az elektronikus szavazást Európa és a világ számos országában vezették már be sikerrel, ugyanakkor Magyarországon – noha a digitalizációt és a digitális állam gyakorlatainak széles körű adaptálását az Európai Unió is támogatja – eddig még nem került alkalmazásra ez a módszer. Kérdés, hogy ez vajon miért van így, hiszen az elektronikus szavazás nem csak a választási procedúrát egyszerűsítheti, de növelheti a szavazói aktivitást is, továbbá megoldást jelenthet olyan specifikus problémákra is, mint például a külföldön élő állampolgárok szavazásának nehézségei. Jelen tanulmány célja, hogy áttekintse: melyek az elektronikus szavazás előnyei és hátrányai, milyen érvek szólnak a magyarországi bevezetése mellett és ellen, valamint vannak-e olyan, technikai vagy jogi akadályok, amelyek jelenleg gátolják, vagy adott esetben ellehetetlenítik az elektronikus szavazás hazai alkalmazását.

Kulcsszavak: elektronikus szavazás, digitális demokrácia, elektronikus kormányzás, digitalizáció, digitális állam

A PÉNZRENDSZER DIGITALIZÁCIÓJÁNAK KIHÍVÁSAI: KRIPTOVALUTÁK JELENSÉGE

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A pénz szerepe és megjelenése a történelem során folyamatosan átalakult: a kezdetleges materiális árupénztől fokozatosan fejlődött, míg végül a hangsúly az immateriális pénzeszközökre tolódott. Erre kiváló példa lehet Svédország, ahol a jelenlegi adatok szerint 2% alatt van a készpénzes fizetések aránya: ezzel az értékkel a világon az első helyen van a készpénzmentesség tekintetében. 3 év leforgása alatt, 2016-ban a mobillal történő fizetések 5,5 billió dollárt tettek ki, ami nagyjából az amerikai piac ötvenszeresének felelt meg. Ez a fajta tendencia több, biztonságpolitikai, gazdasági és kulturális kérdést fog felvetni, ugyanis már a bankszámlapénz sem kizárólagos, mivel rengeteg új alternatív fizetési mód, kriptovaluta jelent meg, amelyek függetlenek nemzeti kormányoktól és a kontrollált bankrendszer megkerülve kínálnak új lehetőségeket. Hipotézisként megfogalmazom azt a tételmondatom, miszerint: a közeljövőben a nemzeti bankok hagyományos értelemben vett jogköre és feladatköre érdemben át fog alakulni. Tézisként állítható, hogy a különböző kriptovaluták előretörésével egyre inkább növekszik az online valuták népszerűsége (2021. január elején az egyik legnépszerűbb kriptovaluta, a bitcoin új történelmi csúcstól döntött. Egy egység bitcoin 40 ezer USA dollárba került!) és kereslete, ezzel egyenes arányban nő az aggodalom, hogy a szabályozatlanság milyen hatással van a gazdaságra globálisan. A kriptovaluta-hálózat jelentős hiányokat mutat a szabályozások területén, nem beszélve a bűnözőkről, adókerülőkről, pénzmosókról.

Kérdés, hogy ez a problémakör mennyire lesz jellemző hazánkban a jövőben, illetve hogyan fog hatni a magyar pénzkibocsátás jogrendjére az EU ezen szabályozása és egyáltalán, hogy integrálhatók a magyar jogrendbe? Hogyan működhet ez az Európai Unió területén? Milyen kontrollt végez(het) az EKB? Egyáltalán kinek a jogköre ilyen valutáknak a forgalomba hozatala, egyáltalán elfogadjuk őket valutának?

Kulcsszavak: pénzkibocsátás, digitalizáció, kriptovaluták, bitcoin, szabályozás

2. ANGOL NYELVŰ ELŐADÁSOK ABSZTRAKTJAI

THE RISKS FACING ELECTRONIC BANKING OPERATIONS AND LEGAL PROTECTION IN JORDAN

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The greater growth in the operations and activities of electronic banks has created new problems for banks and responsible authorities such as central banks to exercise sufficient to keep pace with rapid technological progress. In addition to the high potential for fraud, deception and fraud on open networks such as the Internet, due to the absence of traditional practices that are used to ensure the identity and legitimacy of the customer. It should be noted that electronic payment methods appeared in conjunction with the emergence of e-commerce and became one of its components and completed its procedures.

The most important main risks facing the work of electronic banks, which threaten the conduct of banking and financial operations in various countries of the world.

This article aims to follow up on the latest technical protection systems and protection from online fraud and money theft attacks, and here we ask what are the risks facing electronic banks and electronic payment operations, and discuss and review the regulatory legislation issued by the Central Bank of Jordan to adapt to cyber security risks.

Keywords: Electronic risk, Security, Electronic payment, Cybercrime, Fraud

PARENTAL CONSENT FOR PROCESSING CHILDREN'S
PERSONAL DATA UNDER THE GDPR AND THE COPPA

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Consent is one of the requirements for lawful processing of one's personal data. When it comes to underage children, however, their consent is insufficient to make the process legal; their parents' consent is necessary. Because children are unaware of the consequences and risks of their online activities, as well as their data protection and privacy rights. That is why the GDPR in the EU and the COPPA in the US designate parents as children's personal data guardians if they are under the age of 13 in the US and 13-16 in the EU. The data controller is responsible for ensuring that parental consent is obtained.

In this paper, we will examine and criticize the concept of parental consent, methods for verifying such consent, and data controllers' responsibility in verifying such consent. We will debate whether parental consent is an ideal solution for the children's best interests in terms of their right to privacy, or whether the proper solution comes with stricter rules applied to data controllers by design and by default.

Keywords: Parental consent, verifying consent, children's personal data, lawful processing, data controllers, GDPR, COPPA

STABLE COIN- SHADOW BANKING
RISKS AND LEGAL CHALLENGES

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Traditionally, currency transactions are heavily regulated to address concerns about fraud, money laundering, capital flight, currency manipulation, terrorist financing, and more. But today, the regulatory approach to virtual currencies across the world has varied widely.

Crypto-currencies have been recognized since 2012 the EU has continued to release guidance, trend analysis, and regulations about these digital assets. In 2018, the EU started formulating the 5th Money Laundering Directive.

While blockchain technology is essentially decentralized, regulations in China have aimed to guarantee state control over its development and application. For example, the Chinese government has launched its own digital currency the digital yuan.

While crypto-currency is not outlawed in Russia, there is an ongoing conflict being waged against its use. Russia passed its first laws to regulate crypto in 2020, which for the first time designated crypto-currency as property liable to taxation.

In the United States, where the stock market is highly developed, the legal policy on digital money is relatively flexible. In particular, rules and regulations on contract law and financial transactions are being enforced. New York established a framework for regulating crypto-currency platforms, known as Bit License, in 2015.

The increasing circulation of digital money in the financial markets is the reason for the need for more detailed legal regulation. The experience of some countries shows that they tend a policy of flexible control over the circulation of electronic money. In particular, The United States and the EU countries are pursuing to a policy of expanding the e-money stock market.

Within the framework of this policy, it is necessary to update banking and financial acts and adopt a regulation on consumer protection. In particular, the law should include requirements for virtual asset service providers, procedures for their registration and monitoring, and provisions related to the confidentiality of information.

Keywords: Digital money, Crypto-currency, Bank and finance, legal environment

REGULATORY FRAMEWORK OF DIGITAL EVIDENCE
IN CRIMINAL PROCEEDINGS. CASE STUDY: ALBANIA

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With the development of Communication and Information Technology digital evidence relativity in criminal proceedings has augmented, thus presenting the need to vest the current legislation with accurate legal provisions regarding the identification, acquisition, preservation, examination, and analysis of data stored in electronic devices. Understanding of the current regulatory framework and criminal proceedings practices are pre-requisites for pathing the way to identification and improvement of issues regarding the obtaining, seizure, analysis, and presentation of digital evidence. This paper provides an analysis of digital evidence management legislation under Budapest Convention and its Annexes, typologies & principles and identifies current challenges in the criminal proceedings related to digital evidence.

Providing an in-depth legal analysis on the Convention, its Annexes, data management provisions in the Criminal Procedural Code of the Republic of Albania, current literature, institutional capacities and procedural means, this paper addresses the nature of challenges and explains how the existing gaps in practice condition the effective implementation.

Keywords: digital evidence, legislation, challenges, data management

HARMONIZING THE DIGITAL ENVIRONMENT OF THE STATE AND LAW: A CASE FOR KENYA

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As the global society continues to become interconnected and interdependent, aided by decentralizing technology, governments are compelled to harness digital delivery of services in order to address the ever-rising expectations of citizenry. Today's highly networked and decentralized technology comes with system complexity, often forcing actors to pull in different directions depending on their need drive. This essentially triggers the critical need for the government as conductors and convenors of public service, to strive to integrate and harmonize digital environment within which its services are demanded.

Kenya has firmly established itself as a digital pacesetter on the African continent. In a bid to ensure digital economy benefits become a reality, the country has embarked on digital transformation journey with enthusiasm. As the entirety of sectors that operate using digitally enabled communications and networks leveraging internet, mobile and other technologies continue to grow in Kenya's public sector, the question of how to in sync these services to minimize friction across government entities and enhance service delivery to the citizenry, has ignited greater attention than ever before.

Premised on the desire to harmonize and integrate government's digital services, this paper advocates for the need to set out guidelines to underpin a platform operating model that gives public service providers maximal scope to innovate while retaining high ethical standards and harmony within government operations. In so doing, the paper will examine the digital environment of the State and Law with a particular focus on whether there is any congruence in their operations with regard to digital applications of various platforms, infrastructure and institutions. The article further offers recommendation for greater integration of digital environment to enhance seamless public service.

Keywords: Digital integration, state and law, digital environment

THE LEGAL REFORM OF DIGITAL TAXATION IN INDONESIA

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The Indonesian government decided to enact Law Number 2/2020 to support financial stability for handling the Covid-19 pandemic. Among other things, it aims to enforce income taxes on electronic systems transactions by foreign service providers. Moreover, the Indonesian government also levied a Value Added Tax (VAT) for trading through electronic systems that set the rate at 10%, effective on 1 July 2020, based on Ministry of Finance Regulation Number 48/2020 and Director General of Taxes Regulation Number 12/2020. Overseas traders or platforms who have transactions with consumers in Indonesia with an amount exceeding IDR 600 million in 1 year or IDR 50 million in 1 month and/or having several traffic/accessors exceeding 12,000 in 1 year or 1,000 in 1 month, can be appointed as VAT collectors. This paper will examine the new regulation of digital taxation that only addressed foreign intangible goods and services with an approach of justice and equality in tax collection. Besides, this study will discuss the obstacles and challenges for law enforcement. Finally, this policy creates injustice and inequality between domestic and foreign merchants. In addition, Indonesian taxation policy generally preserves a conventional tax dispute mechanism that is tough to adjust. Law Number 2/2020 regulates punishment for non-compliant VAT collectors, but there are no further regulations regarding the execution of these provisions by the Ministry of Finance. The legal certainty for the involved parties is still questionable.

Keywords: digital taxation, e-commerce, value added tax, Indonesia

CONTRACT LAW REGARDING DIGITAL
CONTRACT IN EMERGING ECONOMY OF 21ST
CENTURY: A COMPARATIVE STUDY

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In business process or even our everyday life the law of contract and proper enforcement of such law play a very significant role. The emerging economy which is now depend on digital world phenomenon becoming electronic based. The era of internet and social networking making people decentralized and self-regulated which attract on online selling and purchasing. So this actually the sign of expanding the electronic commerce which make products more available to the consumers. In this situation E-Contract is an aid to drafting and negotiating successful contracts for consumer and business and other related services. It is designed to assist people in formulating and implementing commercial contracts policies within e-businesses. It contains model contracts for the sale of products and supply of digital products and services to both consumers and businesses. As the electronic contract is not paper based contract rather related to cyberspace so there must have specification provision about such contract. But in reality there is lack of provision in formation and regulating the electronic contracts. In developing economies country like Bangladesh where computerized generation need more protection but in many judgements not allowed the computerized documents and even Information Technology Act, Contract Act, Evidence Act not wholly justified the electronic contracts. In this paper the legal challenges of electronic contract will be focused. The real situation of contract law regarding the electronic contract in context of Bangladesh comparing to other countries also be discussed. The main purpose of this paper is to explore more possible functionality of e-contracts and ascertain legal implication.

Keywords: E-contracts, digital world, cyberspace, e-business, legal aspect

E-GOVERNANCE DEVELOPMENT AS A SUCCESSFUL LEGITIMATION STRATEGY: A CONTENT ANALYSIS

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This paper demonstrates that the development of e-governance can be used as a legitimation strategy. One of the key functions of e-governance is the provision of official information to the public and mass media. Using the cases of two states Kazakhstan and Russia, the study shows how legitimation claims are conveyed through the official governmental websites. This paper uses content analysis to assess what legitimation strategies are used by Kazakhstan and Russia. The findings confirm earlier researchers' claims that all non-democratic regimes strive to demonstrate high sectoral performance. Stressing high economic development, praising the achievements for each ministry has become the way to demonstrate their legitimacy. Official website is a good platform for these activities. In addition, both countries almost equally underscore their international engagement. Nationalism ideals are more specific to Russian government than to Kazakhstani. The government of Kazakhstan is more prone to feature personalistic legitimacy claims.

Keywords: e-governance, content analysis, legitimacy, political regimes, governmental websites

WHAT ARTIFICIAL INTELLIGENCE CANNOT
DO FROM A JUDGE'S PERSPECTIVE?

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It is becoming more and more well known what artificial intelligence is good for, in how many areas, including the field of law, can make our lives easier. The aim of the research and the lecture to be held as a result of it is based on thinking backwards and exploring what artificial intelligence is not capable of according to the current state of science. It explores the topic of how artificial intelligence could be used in court proceedings, what areas would remain where human intervention would be absolutely necessary, given the fact that artificial intelligence is not suitable for the task at hand.

The research is mainly based on the examination of psychological-cognitive abilities, and the results highlight that artificial intelligence is not capable of neoteny (the ability to progressively rejuvenate, juvenilisation).

Neoteny is the purely human trait that allows an individual to return to a lower function level than before, even if they have already above that level, but consider it to be the most appropriate for them. Illustrated with a simple example: it can be observed that a child who is already a house-trained, when their younger sibling is born, suddenly needs to be diapered again because they see that this way their parents will spend more time with them so this is more advantageous for them at that moment.

Examining neoteny in the light of court proceedings, it can be said that it is essential that a judge, when evaluating a case involving a minor (child), be able to “return” to the child’s thinking in order to interpret the child correctly.

Similarly, the role of creativity, emotional intelligence, critical thinking, ethics, social perceptiveness in the work of a judge, as well as the shortcomings of artificial intelligence in this field, will be discussed.

Keywords: court proceedings, AI, judge, AI’s obstacles, neoteny, EQ

MANAGEMENT OF LEGAL KNOWLEDGE.
THE ORGANIZATION OF ACCESS TO LEGAL
KNOWLEDGE AND THE LEGAL REGULATIONS
CONCERNING LEGAL DATABASES IN GERMANY

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In the digital environment of law legal databases are important instruments in the work of lawyers. This applies to every legal employment and every focus of activity. Even the interested public are using legal databases for their own information needs, especially in the times of the corona pandemic. In Hungary the CompLex publishing house (CompLex Kiadó Kft.) is not only publishing professional literature for jurists, but also provides digital information in the form of legal databases. In Germany the publishing house C.H. Beck provides the same range and formats of legal informations via books, e-books and a database. Furthermore legal informations in form of a legal database are provided to German lawyers by the juris GmbH. In contrast to C.H. Beck juris started as legal database and developed since its beginnings additionally more and more publishing activities. The focus of the paper will be on legal online-databases as the aforementioned examples are representative for the main online information sources for legal professionals in Germany. Therefore the following paper intends to give an overview of the legal framework that applies to German online-databases, mainly determined by the Gesetz über das Urheberrecht und verwandte Schutzrechte. whereby the influence of the European law on the German law is likewise considered. The paper intendeds to end with an overview how the development of legal databases in Germany is driven by the field of tensions between the needs of the legal professions and the technical progress and thereby will give a short outlook for further developments.

Keywords: legal online-database; copyright law; information source; lawyer; Urhberrechtsgesetz

EUROPEAN PAYMENTS IN THE DIGITAL AGE

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Electronic payments must be secure and speedy as long as there are online users. More recently, the epidemic has expedited payment digitization and altered public perception of electronic payment systems not only in Europe, but globally. Consumers and businesses alike prefer computerized contactless card payments over cash as a risk-mitigation technique, and no one reverts to old practices after an outbreak. Consumers' concern about virus transmission, along with government mandates to increase the number of non-cash payments, has led to a fall in the use of cash as a means of payment.

As a result, central banks around the world believe that issuing a central bank digital currency (CBDC) would be more likely in the face of the current COVID-19 challenges in order to increase the supply of new payment services and provide a different option for delivering money to society as a result of changing payment habits to contactless payments rather than cash. Several countries have even launched CBDC pilot programs, putting the technology to the test with real-world consumers and businesses. In terms of launching and testing its digital currency, the digital euro, the Eurozone is no different from other regions. The key problem is whether the Eurozone is technically or legally prepared to utilize this type of money and whether consumers will accept the electronic euro as the next means of payment.

Keywords: e-payments, digital currency, central bank digital currency, digital euro

IS THE LEGAL FRAMEWORK FOR MONEY LAUNDERING
IN THE TWENTY-FIRST CENTURY LIKELY TO
BE A CHALLENGE IN THE DIGITAL AGE?

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The challenges of money laundering criminality in the twenty-first century are discussed in this study. As criminals must explore new opportunities, which they will, this adaptation skill is crucial in crime, and money laundering is no exception. The virtual digital world's challenges to the AML in the twenty-first century are analyzed. One element that has contributed to the growth of ML activities is technological advancements, while another aspect that has undermined the AML system is a lack of international cooperation and coordination. As a such, mobile payments, digital money, and e-commerce – particularly virtual currency exchanges – are increasingly popular with criminals. Governments have highlighted virtual currency exchange regulation as a critical necessity for efficient anti-money laundering measures. Its goal is to lay forth the AML regime's legal, regulatory, supervisory, and law enforcement structures. Therefore, Following UN, Council of Europe, and FATF recommendations, the EU's Fifth and Sixth Anti-Money Laundering Directives went into effect in recent years, enhancing digital activity obligations and standard reporting requirements. The European Commission proposed the Markets in Crypto-Assets Regulation (MiCA) in September 2020, a framework that strengthens consumer protections, clarifies digital currency industry conduct, and adds additional licensing requirements. This study brings together two major ideas. Money laundering crime and its countermeasures, as well as emerging technology connected with stored value and smart cards, digital cash, and electronic commerce, will undoubtedly represent a challenge to regulators and law enforcement in the twenty-first century in the digital age.

Keywords: money laundering, twenty-first century, virtual digital world, legal framework, EU, FATF

THE MALAYSIAN PUBLIC SECTOR CYBERSECURITY
STRATEGY: A REVIEW OF E-GOVERNMENT LEGAL
AND REGULATORY FRAMEWORK IN MALAYSIA

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Undeniably, the advancement in ICT has modernized public sector services delivery. Governments worldwide have embraced the use of information technology to deliver a better, more efficient service to citizens, businesses, and agencies through a phenomenon known as electronic government or e-government. The digital transformation of the public sector means that information or data is stored and processed in digital form, or in other words, in cyberspace. By digitizing their operation, the government has opened themselves and made them vulnerable to cyberattacks that will result in threatening disruptions to government services. Through the use of e-government, the public is transmitting their personal, sensitive information through online platforms. Therefore, citizens need assurance that their personal data will be kept private and secure from exploitations, hacks, and breaches. However, the government data center has been subjected as the main target for cybercrime and security threats as they contain various critical private information. Since cybersecurity has become the major concern for national and global security in the 21st century, the government needs to re-evaluate the current legal and regulatory framework at their disposal. Laws should be reassessed and repositioned in order to be enforced in the digital environment, particularly in the context of e-government security. If the government fails to safeguard personal data, prevent data breaches, and protect data from cyberattacks, trust and confidence to use e-government among citizens will be corroded. Consequently, this will lead to the failure of e-government initiatives.

Keywords: E-government, cybersecurity, data protection, law, regulation

USING DATA ANALYTICS FOR RISK ANALYSIS
ON THE CAPACITY OF MIGRANTS TO
CROSS ILLEGALLY THE BORDER

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The migration risks are increasingly prevalent and complex to manage at the border control. Given the inefficiencies of traditional manual risk management practices, research has progressed to using data analytics to objectively and dynamically manage risks on illegal migration. The rapid development of technology has also prompted further innovations in border control. However, border guard agencies must consider practical issues such as machine learning approach on risk assessment to identify the illegal crossings.

The method for this paper will be used the empirical method. Through empirical method will be observed the act of illegal migration that could be performed through different ways. The empirical method would help to produce new solutions for using machine learning in the context of investigation of illegal migration.

This paper aims to study and design a risk assessment system based on big data technology. It is hoped that the system will enhance the ability of border guard agencies to identify the risks of illegal crossings, so as to solve the problem of illegal migration.

As the expected result, the paper will address new approach for investigating cases of illegal migration by using machine learning and big data.

Keywords: Illegal migration, risk analysis, machine learning

DIGITAL MIGRATION AND STATE: THREAT OR BENEFIT

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The global coronavirus pandemic has forever changed the world in „before” and „after”. As a result of the pandemic, the world has faced global isolation and de-globalization, which has affected not only the political structure of the world, but also the economic one. Tourism has been one of the most affected business sectors.

In the „after” pandemic time, the digitalization of migration in the concept of digital nomad visa has become an increasingly popular concept. It aims at both, fulfilling the needs of countries that are directly dependent on tourism and individual entrepreneurs or remote workers who live a nomad life and are not planning to impose additional pressure on the local job markets.

Until July 2021 just 24 regions have been offering an avenue for ‘workationing’ abroad but more and more countries make digital migration possible.

This study compares two models of migration, classical and digital. The study answers the question, is digital migration really an advantage or is it still a threat?

Keywords: migration, digital governance, digital migration, post pandemics

THE IMPACT OF COVID-19 IN UTILIZING
THE TECHNOLOGY FOR FUNCTIONING
OF THE COURTS IN KOSOVO

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The development of technology in the recent decades has clearly addressed the need to integrate technology in the judicial system since it has great potential to substantially improve the court system. The outbreak of COVID-19 in early 2020, forced all courts and public services around the world to adopt technology at swift speed and scale, and switch to online operations in a matter of weeks. Kosovo was no exception in this situation and as COVID-19 spreading, courts closed and there had to be taken immediate steps to ensure functioning of the judiciary and guarantee the basic rights for its citizens. This paper aims to prove that courts in Kosovo need to develop immediately digitalization strategy and improve technological and human capacities to use technology in court proceedings beyond emergency situations.

Providing a legal analysis of the data and reports related to work of the courts in Kosovo during pandemics period, this paper suggests that by incorporating technology tools in courts, people are offered faster access and less expenses; however, this paper also addresses that shifting from in-person to online services is not a solution for all, in particular for the citizen who lack technology tools, such as proper computer or high-speed internet access, or even for the elders who lack the skills to use such tools. Finally, this study suggests that Kosovo Judicial Council should develop clear and detailed strategy to improve the courts technological capacities and develop rules to govern such digital operations, by working at the same time to improve the in-person processes of accessing justice for all citizens.

Keywords: Technology, digitalization strategy, legal system, court access

ELECTRONIC ARBITRATION AGREEMENT

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We cannot overlook the technical progress made this century, which was not limited to a single science or party. Rather, all walks of life are affected by it. We cannot rule out the completion of legal work, the conclusion of contracts, and the execution of such contracts in certain cases because of technical advancements, as well as the resolution of their conflicts using the same technology for electronic resolution. That is, the procedures are carried out over an electronic network without the parties having to be present in the same place.

The year 2020 was the greatest evidence of the need for humans, especially dealers – from the point of view of law – for international commercial contracts, whose owners cannot be in the same place, to regulate such electronic transactions that are concluded and settle their disputes on the electronic network.

Because of the nature of the Internet, a new type of arbitration has emerged, which differs from traditional dispute resolution mechanisms. This form is completed on a computer screen, in accordance with the nature of electronic commerce, which disregards spatial boundaries. The importance of electronic arbitration extends to what it raises in terms of procedural and substantive legal issues that are directly related to the concept of arbitration itself in its abstract framework, as well as to structures and institutions on the one hand, and judgments on the other hand in their electronic framework.

Although the topic of electronic arbitration in and of itself makes us stand in front of many controversial issues that deserve the uniqueness of studying a research on its own, I want to be satisfied with seeking to achieve one goal of this research, which is to be able to define what the electronic arbitration agreement is as a term and a modern concept, and access to understand the substantive and procedural legal aspects related to it, all of this as a means of resolving electronic commerce disputes.

It can be said that electronic arbitration begins with the first step, as does traditional arbitration with the parties to the disputed legal relationship over their choice as a method for settling the existing dispute between them.

Keywords: Commercial relations / Arbitration / Electronic Arbitration / electronic commerce

ARISING CHALLENGES IN TAXATION –
THE TREATMENT OF CRYPTOCURRENCY

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Blockchain technology is a closely followed topic in the financial technology industry. Even though cryptocurrency has been around for a few years now, it still seems not to be well-defined. The global crypto market capitalization has passed 2 trillion dollars, however, there is much uncertainty in the regulation regime worldwide. To some, cryptocurrency is an investment, to others it is property, and some may even say it is a commodity. The governments' attitude towards cryptocurrencies, and in particular towards the underlying technology are very diversified. Different jurisdictions, different approaches. More and more regulators are worrying about criminals who are increasingly using cryptocurrencies for illegitimate activities like money laundering, terrorist financing and tax evasion. It is essential to create favorable conditions for the establishment and development of the sector, while protecting all market participants' interests. Cryptocurrencies require a special tax structure of their own, especially because their decentralized nature was built specifically to ensure non-compatibility with overarching revenue siphoning methodologies. In other words, nations need to consider this futuristic digital asset as a stand-alone economic element that deserves a taxation structure of its own. The presentation will identify key tax policy considerations of cryptocurrencies by overviewing some of the major country treatments focusing on the USA, Latin-America and Europe. The author will also examine the typical "lifecycle" of a unit of virtual currency, emphasizing the key stages in which tax consequences may arise. Last, but not least will highlight common challenges and emerging issues in taxing virtual currencies.

Keywords: Taxation, Technology, Blockchain, Cryptocurrencies

THE LEGAL ISSUES OF ELECTRONIC COMMUNICATIONS UNDER CISG

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The 21st century witnesses a significant change in commerce due to the development of technology. The changes in forms of communication in international trade such as voice, video call, email, SMS have outstripped and replaced other more traditional forms of communications such as paper, post, letter. In international transactions, using electronic means of communication technology has been popular for parties to conclude international sale contracts. However, the law of contract has been trailing behind in the advancement of solutions for the use of electronic communications in commerce, leading to legal uncertainty which in turn creates obstacles to trade. The United Nations Convention on Contracts for International Sale of Goods 1980 ('CISG') was introduced a quarter of century ago with the aim of uniformity for international sale of goods worldwide; its regulations on electronic communication were absent. The research aims to determine whether the CISG covers the elements of digital communication in an international transaction since there is no clear mention in the Convention. The research examines the form requirement under Article 13 of the Convention which includes telegram and telex to be considered as writing and whether this also includes electronic transactions. Besides, the research identifies whether other terms, for example 'notice', 'oral', 'reach' refer to the use of electronic communication. The research also discusses the concept of cyberspace as a place of business to determine the requirement of internationality under the Convention. The research thereby asserts that the CISG does apply to the use of electronic communication technology in international sale contracts.

Keywords: Electronic communication, CISG, international sale contract

BIOMETRIC DATA SHARING IN ADDRESSING
IRREGULAR MIGRATION AND SECURITY
ISSUES WITHIN THE BALI PROCESS
FRAMEWORK FOR INDONESIA

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The Bali Process Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime acknowledges the large scale and complexity of irregular migration challenges both within and outside the Asia Pacific region. As one of the efforts to decrease irregular migration in this region, the Regional Support Office of the Bali Process (RSO) was established in 2012 to support the implementation of the Bali Process. In this regard, the Bali Process led to an opportunity to develop the use of technology and biometrics data sharing in migration and border management. The purpose of this paper is to discuss the law and policy in addressing the issue of irregular migration in Indonesia. It also explores the development of the utilization of technology and biometrics in the area of migration, security and border management, as a measure in addressing the problem of irregular migration. The discussion focuses on the role and challenges of technology and biometrics data exchange in border management as one of the most important agreements on the Bali Process. This study finds that the gaps within the ASEAN member states in regulating privacy rights and data protection have caused the difficulties in sharing and exchange data/information particularly biometric data. The method used in this research is the doctrinal legal research, which is mainly referred to as library-based research.

Keywords: Immigration; Digital Governance; Migrants; Bali Process

THE RELATIONSHIP BETWEEN AI RISK ANALYSIS AND
PROSECUTION IN THE UNITED STATES OF AMERICA

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In the 21st century, the rapid development of technology left many people feeling uneasy, but as time went on, we discovered its potential. Artificial intelligence is the future, but its use certainly needs to be monitored. In the United States of America, pre-sentence investigation reports (PSIs) have been used for decades, and in recent years a new element has been added to the information database in several member states: IT-based risk analysis data. If modern society intends to rely on algorithm-based risk analyses as a tool in criminal justice, a critical examination of these methods is crucial. In the United States of America, the need and justification for the use of such methods has been driven by one of the biggest problems in the wider criminal justice system, overcrowding in prisons. The country has an extremely high prison population due to the strict use of criminal law as a deterrent for committing crime. This is, of course, far too costly. So, it is not surprising that in recent years economic austerity has become a central issue in the US criminal justice system. To prevent the overcrowding of prisons, all member states use various assessment tools based on computerized risk analysis, such as COMPAS in many areas of the justice system. In the United States specifically, the use of a patented and secret algorithm in the criminal justice system is generally and widely accepted, albeit not without some reservations, as it could be used to influence the outcome of certain cases. The use of the results of the risk analyses raises unanswered questions such as the right to a fair trial, the principle of publicity, non-discrimination, equality before the law and the requirement of equal treatment, which are currently still to be resolved in the context of the algorithm.

Keywords: USA, AI, COMPAS, criminal justice, discrimination

AL ANIMAT, MOHAMMAD

The Risks Facing Electronic Banking Operations and Legal Protection in Jordan

Introduction

Electronic payment operations have become in the minds of banks until they occupy a good position in the competition among them, and despite the fact that they are surrounded by many risks, this is called the risks of electronic payment operations, and this is what will be addressed.

Electronic banking means virtual access to bank account information. One of its main problems is the huge difference between a non-digital human connection, which uses different identification mechanisms (name, password, handwritten contract, etc.), and an electronic/digital connection that uses the authentication methods mentioned in this paper.¹

Integration of risk management processes The electronic payment aims to ensure and define an understanding of the nature of the interrelationships between the various risks in the bank, as it is not possible to evaluate the impact of certain risks in isolation from the rest of the other risks related to the bank's work, and the risk management process is comprehensive at the level of the institution as a whole, which leads to the application of Integrated risk management, in addition to the ability to understand the interrelationships between different risks. Electronic payment operations and their attendant effects in a way that negatively affects the operations of the bank. For example, in Sri Lanka, the results of the completed study revealed that financial and security risks are taken into greater consideration by e-commerce users than other risks such as perceived, operational and financial risks.²

¹ HANA EK, Petr – MALINKA, Kamil – SCHA FER, Jiri: *E-banking security – comparative study*. In: 42nd Annual IEEE International Arnahan Conference on Security Technology, Prague, Czech Republic, 2008. 326–330.

² RAJARATNAM, Arthika: The Factors Influencing on Internet Banking Adoption in Trincomalee District, SRI Lanka. *International Research Journal of Advanced Engineering and Science* Vol. 4 Issue 1 (2019) 160–164.

The Basel Committee on Banking Supervision indicated that banks should put in place policies and procedures that allow them to manage these risks through their assessment, monitoring and follow-up. The Basel Committee on Banking Supervision is the committee that was established and consisted of the ten industrialized countries: Canada, Britain, France, Italy, the Netherlands, Sweden, the United States of America, Switzerland, Japan, Luxembourg, at the end of 1974, under the supervision of the Bank for International Settlements in the Swiss city of Basel, and from The most important goals of the stability of the international banking system, especially after the exacerbation of the debt crisis for the poor countries of the world.

The risk assessment should be carried out by an independent body with sufficient authority and experience to assess risks, test the effectiveness of risk management activities, and make the necessary recommendations to ensure the effectiveness of the risk management framework.³

There must be plans reinforced with preventive measures against crises, to be approved by the concerned officials, to ensure the bank's ability to withstand any crisis or failure in the systems or communication devices, provided that these plans are subject to periodic testing.

Data and Methodology of study used

The research depends on the descriptive analytical approach to verify the most important risks facing electronic payment operations. These risks are analyzed and taken advantage of to keep pace with modern protection methods related to the topic of research, discuss the most important forms of financial fraud, and develop the best recommendations for the use of protection methods and keeping pace with high technological development.

And review the laws issued by the Central Bank of Jordan and the instructions for cyber risks according to the Central Bank of Jordan and what is related to the licensing of electronic banks and the regulations issued by The Basel Committee on Banking Supervision (BCBS) in addition to the laws issued by the United Nations⁴ to protect against risks that threaten consumers in the field of cyber security and electronic commerce.

The policy of the Jordanian government measures

Remittances outside the country are considered one of the most important risks facing electronic banks, which may cause great harm to the economy inside the country. Which he enjoys, but at the same time, he may be exposed to great risks, whether at the level of maintaining that good money from the banks or the economy of countries as a whole.

Threats should not affect or limit the spread of electronic payment operations. Rather, governments and legislative councils that are concerned with protecting the interests of customers and citizens, which may be represented by the Ministry of Investment

³ Instructions for adapting to cyber risks issued by the Central Bank of Jordan on 6/2/2018.

⁴ UNCITRAL Model Law on Electronic Commerce New York, 1996. 11.

and the Central Bank, should take into account these risks, and develop the necessary technology to prevent their occurrence on an ongoing basis and binding on electronic financial companies, by reducing its incidence to the lowest possible degree.

Jordan's policy was to protect customers from the risks of electronic fraud through the application of general rules to protect customers and citizens through the role of the Central Bank of Jordan in regulating electronic payment methods for banks, the Jordanian government encouraged citizens to go to electronic transactions and provided them with all means of protection from electronic risks. It has worked to promote the e-government program and electronic payment through the application (e-Fawateercom).⁵

In fact, the Central Bank of Jordan has developed a legal regulation regulating the work of electronic companies, electronic banks, traditional banks, electronic payment companies, and electronic transfer companies. Electronic payment is up and running. This definition legally applies to electronic banks, because it deals with the same systems and manages them electronically, and these electronic companies are not entitled to a license except after obtaining the approval of the Central Bank and submitting an application for a license through which the Central Bank requires its supervision and follow-up on the operations of the electronic bank.⁶

The researcher believes that subjecting traditional or electronic banks to the control of the Central Bank secures the necessary protection for customers, and cultivates a kind of confidence towards modern electronic payment processes that are dealt with behind screens. The Central Bank has taken over the protection of customers by enacting instructions and regulations to compel electronic financial companies to protect customers.

The legislative framework of the Central Bank appears by issuing the appropriate regulations, instructions and circulars for the activities of payment services and electronic money transfer in Jordan, defining the terms of dealing with them, settling disputes that arise between its parties, in addition to the technical and technical procedures and requirements for electronic money. Payment tools and directing those who engage in such activities to comply with them.

Regulatory framework: The regulatory framework in the Central Bank is to supervise all electronic payment systems and monitor all activities of managers and operators of electronic payment systems, participants in them and providers of electronic payment services.

It is possible to count as an example one of the largest electronic banks in the world in terms of definition and electronic payment methods provided through it to most countries of the world and the legislative texts to protect the electronic financial system and the licenses that had to be obtained from the Central Bank of Lithuania to license a Revolut bank, s a financial technology company that provides banking services in Europe and the world.

⁵ <https://bankofjordan.com/ar/digital-banking/e-fawateercom> (30.05.2022).

⁶ View the application form for licensing payment companies and electronic money transfer in the Hashemite Kingdom of Jordan, issued by the Central Bank of Jordan. Ammam, 2015. 17.

License conditions for providing banking operations in digital banks

The Jordanian legislator determined the licensing of digital banks in accordance with Article (31) of the Constitution and based on what was decided by the Council of Ministers on 10/18/2017 the Central Bank of Jordan issued the electronic payment and transfer system Law No. (111) of 2017 in accordance with Articles (21) and (22) From the Electronic Transactions Law No. (15) of 2015 which deals with all matters related to licensing electronic banks in Jordan, electronic banks are considered in Jordan. The same material value that traditional banks pay in terms of fees upon licensing and in accordance with the regulations issued by the Central Bank of Jordan.⁷

In order for a bank to obtain a license to provide electronic banking services, it must first create a website for itself, after obtaining a set of licenses through the following: Granting licenses is limited to banks registered with the Central Bank alone. That the bank fulfill the regulatory controls related to the extent of its commitment to the following: capital adequacy, principles of loan classification, credit concentration and others. The bank follows the principles of risk management when providing its services via the electronic network, and the licensed bank disclosed on its own page that it obtained a license by number and date, in addition to linking the bank's website to the central bank page.

Businesses should have mechanisms in place to handle complaints that provide consumers with a prompt, fair, transparent, inexpensive, accessible, rapid and effective resolution of disputes without undue cost or burden. Companies should consider subscribing to local and international standards related to internal complaints handling, alternative dispute resolution services, customer satisfaction rules and providing all means of protection against cyber risks to these processes.⁸

The Necessity of Creating a Regulatory Legal Legislation

When we research the extent to which the legal legislation covers the issues of the risks of electronic payment methods.

In fact, in Jordan there is the Cybercrime Law of 2015 and it is the authorized legislation that addresses the risks that arise from electronic operations in general, The electronic services provided by banks are characterized by speed, flexibility and simplicity, and therefore this matter required the existence of legal legislation that protects and cultivates confidence by customers in these banks and solve any dilemma he needs, hence the need for the intervention of central banks in the countries, in order to establish a legislative legal organization that cultivates confidence in the customer and forces electronic banks to apply the legal foundations regulated by the Central Bank to protect the interests of all parties,⁹ and from For that, some international

⁷ Article (31) of the Constitution and based on what was decided by the Council of Ministers on 10/18/2017 the Central Bank of Jordan issued the electronic payment and transfer system Law No. (111) of 2017.

⁸ United nations Consumer Protection Guidelines United Nations. New York and Geneva, 2016. 10.

⁹ Electronic Payment System No. (111) of 2017, issued by the Central Bank of Jordan.

models of the extent of central bank control over the legal regulation of banks will be studied.

The Jordanian Electronic Transactions Law requires these companies to obtain a license from the Central Bank of Jordan, where Article (22) of it stipulates the following:¹⁰

- a) Without prejudice to any law, every payment and electronic money transfer company must obtain License from the Central Bank of Jordan.
- b) Payment and electronic funds transfer companies, in carrying out their activities, are subject to the supervision of the Central Bank, the Jordanian and his knowledge.
- c) For the purposes of this article, a payment and electronic transfer of funds company means the company that practices Payment services, transfer, financial settlement, electronic clearing, or issuance of payment tools and systems and its management in accordance with the provisions of this law and the regulations and instructions issued pursuant to it or the legislation other related matters.

In fact, we need an in-depth study, taking into account the Jordanian Transactions Law of 2015 and UNCITRAL International Trade Law, and the United Nations Guidelines for Consumer Protection, which are international comparative laws.¹¹ Consumer privacy and data security. And the terms of the contract are clear, concise, easy to understand, and unfair. Finally, clear and timely information enables consumers to easily contact businesses.

Legal Principles

At the legislative level, the legislator must realize the nature and requirements of the information age, and that there is an urgent need for an integrated package of laws that must be enacted to address all the effects of the difference in the electronic environment in which it is located. Banks operate from their traditional environment, where many existing laws appear to be invalid. Facing the various and growing problems related to the use of computers in the banking field, through the formation of a legal committee under the supervision of the Central Bank and members of banks who provide electronic services in order to disclose their need for some important matters. The legal foundations that serve the banking financial work and work on its development in order to make amendments to the electronic financial legislation that has become obsolete in proportion to the need of the current time.

General legal principles must be observed in protecting customers from electronic risks. The responsibility for risks lies primarily with the board of directors of each bank, which is responsible to the shareholders about the bank's business, which requires an understanding of the risks faced by the bank and ensuring that it operates in an effective manner. Accordingly, the risk Policies are set by the bank's senior management, and the board of directors must review them. The risk management policies must include defining

¹⁰ Article No. 22 of the Jordanian Electronic Transactions Law No. 15 of 2015 issued in the official newspaper.

¹¹ United nations Consumer Protection Guidelines United Nations. New York and Geneva, 2016. 11.

or defining risks and methods or managing and controlling the risks facing electronic payment operations because the most important characteristics that encourage the adoption of electronic banking services are convenience and ease of use¹², the general legal principles in protecting customers from electronic risks issued by the Basel Committee must take into account many tasks and duties.

I will analyze one of the fraud cases decided by the European Court of Justice on November 11, 2020, the Court of Justice of the European Union (CJEU) held that the near-field communication (NFC) functionality of a bank card, also known as contactless payment, in itself is a “payment instrument” as defined in the EU Payment Services Directive 2015/2366 (PSD 2).

The CJEU also clarified the meaning of “anonymous use” under PSD 2 with regard to NFC functionality. The court stated that a bank may not exclude its liability for unauthorized low-value transactions in its general terms and conditions by simply claiming that blocking the NFC functionality would be technically impossible, but must prove impossibility in light of the objective state of available technical knowledge when a customer reports a lost or stolen bank card.

Furthermore, the court ruled that if the user is a consumer, general terms and conditions that provide for tacit consent to possible future amendments to such terms and conditions must comply with the standard of review set out in Directive 93/13 on consumer rights protection, not with (PSD 2).¹³

Conclusion

Through this study, the researcher can extract and suggest a set of relevant findings and recommendations to generalize and consolidate the interest as follows:

In fact, according to my opinion, banks should prepare qualified banking human cadres to work in the face of risks that threaten electronic payment operations, taking into account accuracy and security to ensure proper use of the network to complete electronic payment operations. Or tampering with accounts and balances in banks that require updating information systems to keep pace with all technical developments and continuously absorb them and keep pace with the technological development to combat hackers in addition to combating computer viruses, which is one of the most threats facing electronic dealing. Perhaps the most important security tools in use today are firewalls and encryption

Its technological infrastructure is well-developed in order to be able to provide electronic banking services events to its customers.

We advise banks to state in the contracts they conclude with customers over the network that the geographical scope is specified within the countries that are signatories

¹² JIAQIN, Yang – LI, Cheng – XIA, LUO: A comparative study on e-banking services between China and USA. *International Journal of Electronic Finance* (3) (2009) 235–252.

¹³ European Court of Justice Rules on Liability of Banks for Unauthorized Low-Value Transactions Using Contactless Payment. Library of Congress, Vienna, 2020. 11.

to international electronic trade agreements, in order to avoid conflict with countries that do not recognize these agreements since the scope of the service listed on the network is all over the world. Choosing a technical supplier, provided that he has the technical expertise and honorable career history.

Electronic banks must follow advanced and continuous methods of technological prevention and protection to face expected natural disasters such as humidity, heat, unexpected fires, floods, fluctuations and power outages, wars, earthquakes, etc., in order to prevent computers from being exposed to them. Damage and damage and to prevent the immediate impact of electronic banking operations.

At the legislative level, the legislator must realize the nature and requirements of the information age, and that there is an urgent need for an integrated package of laws that must be enacted to address all the effects of the difference, as many of the current laws seem to be invalid, to face the various and growing problems related to the banking field, by forming a legal committee under the supervision of the Central Bank and members of banks who provide the electronic service to disclose their need for some legal foundations that serve the banking financial work and work on its development in order to make amendments to the electronic financial legislation that has become obsolete, including It fits the needs of the time. Rather, electronic banks should play a role in preparing these laws to reach sound legal results, given their important practical experience in this regard.

JAHAN, BUSHRAT

**Digital Contract in Emerging Economy
of 21st Century: A Comparative Study**

Introduction

Electronic contract is designed to assist people in formulating and implementing commercial contracts policies within e-businesses. It contains model contracts for the sale of products and supply of digital products and services to both consumers and businesses. An e-contract is a contract modeled, executed and enacted by a software system. Computer programs are used to automate business processes that govern e-contracts. E-contracts can be mapped to inter-related programs, which have to be specified carefully to satisfy the contract requirements. Particularly in the internet such contracts have put on flexibility of contract, and the suitability and multiplication of standard type of agreements.¹ With the growth of E-commerce there is rapid advancement in the use of e-contracts. But deployment of e-contracts poses lots of challenges like, conceptual, logistic and implementation. It is more unlikely for the internet users a day has passed without dealing with computers or other devices where they had not manifest their assent to some terms. As, in case of installing any software there is only an icon “I Agree” for their assent. These type of action also formulate e-contracts day to day life.

An e-contract is an agreement demonstrated, executed and established by a product framework. E-contracts can be settled between related projects, which must be indicated deliberately to fulfill the agreement necessities. E-contract is any sort of agreement shaped over the web based business by the connection of at least two people utilizing electronic means, for example, email or the cooperation of a person with an electronic specialist. Customary contract standards and cures also applicable to e-contracts. With the changing of time the idea of E-Contracts or Electronic Contracts has concocted the

¹ ABDULHADI M., Alghamdi: *The Law of E-Commerce: E-Contracts, E-Business*. Author House, United States of America, 2011.

improvement of Electronic Commerce framework over the globe. Electronic trade can be characterized as “Electronic purchasing”² and offering on the Internet and incorporates and exercises that a firm performs or offering and purchasing administrations and items utilizing computers and correspondence advancements. The virtual or electronic contracts open door for gatherings to enter into an agreement over web. E-Commerce is the practice of buying and selling goods and services through online consumer services on the internet³.

Electronic transactions are fast emerging as an alternative means of carrying out transactions instead of paper based transactions. However, with the increase of transactions on the internet the issue of authenticity and legality come into an important issue. Contracts made under cost of huge sum of money were being entered into without ensuring the validity and authenticity of the parties.⁴ In a number of countries existing legislation governing communication and storage of information is inadequate or out dated in that it does not contemplate the use of electronic messages in commerce. Although the use of electronic mail for the conclusion of contracts is widespread, the need for legal certainty was also felt in many countries when they faced forms of old paper based communication techniques in this modern era.

What is Valid Contract?

A contract is a voluntary arrangement between two or more parties that is enforceable at law. It is a legally binding agreement that obligates two or more parties to complete certain tasks. It creates rights and obligations to parties of the contract. A Contract is a promise or set of promises made between two or more parties and breach of such promises allow the courts to make a punishment.⁵

A Contract is an agreement between two or more competent parties, based on mutual promises, to do or to refrain from doing some particular thing that is neither illegal nor impossible. The agreement results in an obligation or a duty that can be enforced in a court of law. Both of the agreements in this case resulted in legally enforceable contracts because the parties agreed mutually satisfactory.⁶

Basically, a contract is a bundle of rights and obligations binding parties to one another in exchange of promises with a consideration. The Contract Act, 1872 defines contract as “an agreement which is enforceable by law is a contract.”⁷ This means that all agreements are not contracts. Only those agreements which can be enforced by law are contracts.

² SUBAASHINI, S. R. – SHAJI, M.: Legal Issues Arising in E-contracts in India: An Analysis. *International Journal of Pure and Applied Mathematics* Vol. 120 No. 5 (2018) 4601–4618.

³ BLOUNT, Simon: *Electronic Contracts: Principles from the Common Law*. Chatswood, New York, 2009.

⁴ SIEMER, Timo: *Formation of Electronic Contracts Under Traditional Common Law Principles: Offer and Acceptance in E-Commerce*. GRIN Verlag, US, 2011.

⁵ TREITEL, G. H. – PEEL, Edwin: *Treitel on the Law of Contract*. Sweet & Maxwell, London, 2011.

⁶ BROWN, Gordon W. – SUKYS, Paul A.: *Business Law*. Mcraw-Hill, New York, 2001. 95.

⁷ Section 2, Contract Act, 1872. Act No. IX of 1872.

A contract is a promise or set of promises for the breach of which law gives a remedy or the performance of which law in some way recognizes as a duty.⁸

A valid contract is legally binding agreement which recognizes and governs the rights and duties of the parties.⁹ A valid contract is legally enforceable against both of the parties because its formation meets the requirements and approval of the law.

It is a common misconception that a contract may only be in written form, as oral or conduct agreements can be just as credible in contract formation. A contract is unique in that unless certain exceptions apply, parties are free to agree to whatever terms they choose.¹⁰ In our everyday life we unknowingly form a contract. A contract can be described as a legally binding oral or written agreement which exchanges any combination of goods, services, money and property. If the main elements are not in contract, it would be an invalid contract.¹¹

Essential Elements for Valid Contract

In the Anglo-American common law, formation of a contract generally requires an offer, acceptance, consideration, and a mutual intent to be bound. Each party must have capacity to enter the contract.¹² The characterization of a party's communication as an offer or acceptance can determine when the exact moment of contract made and which party assumes certain risks.¹³ Furthermore, it can also determine where the contract is deemed to have been made, where the parties are located in different jurisdictions, and accordingly, what laws will apply, and which courts will have jurisdiction. As such, it is important to examine whether there has been an event that constitutes a valid offer and acceptance, and whether and when communication of such an event took place. An agreement for becoming a valid contract which is enforceable at law must possess the following elements:

Offer

“The offer is an expression of willingness to contract made with the intention (actual or apparent) that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed.”¹⁴ The first element in a valid contract would be offer. If there is no offer, then no valid contract can be made.

⁸ BEATSON, Jack – BURROWS, Andrew – CARTWRIGHT, John: *Anson's Law of Contract*. Oxford University Press, 2020.

⁹ RYAN, Fergus: *Contract Law: Nutshell*. Round Hall LTD, 2006.

¹⁰ *Contract Law. Lectures – An Introduction*. <https://www.lawteacher.net/lectures/contract-law/?vref=1> (16.03.2022).

¹¹ *Main Elements constituting A Valid Contract*. <https://www.lawteacher.net/free-law-essays/contract-law/main-elements-constituting-a-valid-contract-contract-law-essay.php> (05.03.2022).

¹² www.lawhandbook.sa.gov.au (12.03.2022).

¹³ CAMPBELL, Christian et al: *Law of International Online Business: Global Perspective*. Sweet & Maxwell, London, 1998.

¹⁴ NUTH, Maryke Silalahi: *Electronic Contracting in Europe*. Sweet & Maxwell, London, 2001.

The making of the offer is actually the first step in creating the contractual relationship between the two parties. Because of this position of importance, the offer must be seriously intended, clear and definite and freely communicated to the offeree. If these requirements are met it is then up to the offeree to accept or to reject the offer.¹⁵

An offer must be clear and made with the intention to make a contract that it should be binding. It follows that if an individual is not willing to implement the terms of his promise, but is merely seeking to initiate negotiations, then this cannot amount to an offer rather such statements can be called “invitation to treat”. These invitations to treat would be restricted to statements made in the course of negotiations towards a contract indicating one’s willingness to receive offers.¹⁶

Acceptance

An acceptance is a final and unqualified expression of assent to the terms of an offer. It turns a specific and comprehensive offer into an agreement. The acceptance must be unconditional and unequivocal. This means the offeree’s expression of intention and assent must be made in response to, and must exactly match, the terms of the offer. Any attempts to introduce a new term will itself become a counter-offer that destroys the original offer and operates as a rejection of the original offer.¹⁷

Communication

Acceptance has no effect until it is communicated to the offeror because it could cause hardship to an offeror if he is bound without knowing that his offer had been accepted. When the acceptance is sent by post there are three basic rules that can be applied to decide when acceptance is actually communicated: (i) when the acceptance is posted (ii) when the acceptance is received or arrives in the address of the offeror or (iii) when the acceptance comes to the knowledge of the offeror.

Consideration

No consideration no contract is a fundamental principle of contract law. Consideration means to get something in exchange or something in return. Consideration is the essential element of a valid contract.¹⁸ Consideration in a contract would mean the other person would be giving back something in return. It would be considered as an exchange which would be made between the promises and promisor. There should be consideration in a contract so that it would be legally valid.

¹⁵ BROWN-SUKYS, 2001. 97.

¹⁶ POOLE, Jill: *Text Book on Contract Law*. Blackstone Press, 2001. 32.

¹⁷ ZIMMERMANN, R. – WHITTAKER, S.: *Good Faith in European Contract Law*. Cambridge University Press, 2000.

¹⁸ Act No. IX of 187.

Legal Intention

It is a general rule that an agreement made without any intention of creating legal relations is not binding as a contract.¹⁹ For example, when two friends promise to see a musical concert whereby one promises to pay the concert ticket if the other pays for the drinks after the concert, considerations are present in this relation but there is no intention to create legal obligations.

Competency of Parties

Capacity to contract usually refers to a natural person's legal competence to enter independently into valid transaction. Parties who are entering into a contract must have the mental ability to understand the consequence of such contract. Under The Contract Act 1872, minors, insane people or people with unsound minds also cannot enter into any valid contracts.²⁰

Free Consent

Mere consent is not enough for a contract to be enforceable the consent given must be free and voluntary. A Consent that is free from Coercion, Undue Influence, Fraud, and Misrepresentation. The consent might be about entering into contract or consent to accepting the offer, any type of consent must be free and voluntary.

Types of Contracts

The Contracts which are enforceable in a court of law are called Valid Contracts. If one party to the contract has the option of enforcing a contract by law, but not at the option of the other such contract known as voidable contract. Void contract is not void from its initial rather an agreement may be enforceable at the time of initiation but later on due to certain reasons like impossibility or illegality of the contract, it may become void and unenforceable. If the contract has unlawful object or intention, it is called Illegal Contract. A contract which has not properly fulfilled legal formalities is called unenforceable contract. That means unenforceable contract suffers from some technical defect like insufficient stamp etc. After rectification of that technical defect an unenforceable contract can become enforceable or valid contract.

Express contract, where the offer or acceptance of any promise is made in words, the promise is said to be express. For example: A has offered to sell his house and B has given acceptance. It is Express Contract. An implied contract is one which is inferred from the acts of the parties or course of dealings between them.

Written contract are those contracts which are materialized in a paper and signed by both parties with all of the formalities. But sometimes there also can be oral contracts

¹⁹ FLENSSE, A: *European Contract Law: Formation, validity, and content of contracts, Contract and third parties*. Oxford University Press, 1997.

²⁰ Act No. IX of 1872.

only. There is a big misconception that valid contracts must be written form. But the orally constituted contracts also can have the same legal validity as the written contracts.

Electronic Contracts

The invention of electronic technology and the internet has changed the way we communicate, learn, work, and do business. It has brought the world's people closer in time and space; businesses now work more efficiently with suppliers and consumers; consumers now have a greater choice and can shop from the comfort of their homes; offices; or even while travelling, for a wide variety of products, from sellers all over the world. Marketability of products is no longer confined to the boundaries of their nations. With a couple of clicks one can buy and sell from any part of the world and the desired product will be delivered at the door step of consumers.

An electronic contract is an agreement that is drafted, negotiated, and executed completely online. Electronic contracts can eliminate many costs associated with traditional pen-and-paper contracts and it countless other advantages. Everyday knowingly or unknowingly we become part of such contract. In this recent times we are surrounded with web of internet and take technological support in every minute. With the idea of e-commerce, the e-contracts become the necessity.²¹

Essentials of Electronic Contract

An electronic contract is an understanding made in electronic frame as there is no paper or other printed copies are utilized. For instance, you compose an agreement on your computer and send it through internet to a business relate and the business relate messages it back with an electronic mark demonstrating acknowledgment. An e-contract can likewise be as a contract generally utilized with downloaded programming. Though electronic contract is not like general idea of paper based contract but it also must contain some essentials for being a valid contract. Those are as follows:

The offer

An offer has to be made even in the case of E-Contracts. In many online or electronic transactions, the offer may not be made directly one to one rather to the all community of consumers. The consumers can browse all the available goods and services displayed on company's website. But the invitation to treat is not valid offer for constitute a contract.

The Acceptance

It would be convenient to mention that the statutes of various countries consider that any consent through electronic means falls within the expressed declarations of intent.²²

²¹ GRUNDMANN, Stefan: *European Contract Law in Digital Age*. Intersentia press, 2018.

²² BARNET, Randy E.: *Contract is not Promise: Contract is Consent*. Georgetown University Law Center, 2011. <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1614&context=facpub> (30.05.2022).

Basically, the same requirements apply to acceptance through an electronic agent in case of e-contracts.

In regard to acceptance that must be made between parties, there must have a timeframe, the means of accepting may be physically present of parties or through electronic means. In case of physical or paper base contract the acceptance can be made immediately but in electronic contract it not considered as immediate one.

Lawful Consideration

In a contract for the sale of goods, the money paid is the consideration for the vendor, and the item sold is the consideration for the purchaser.²³ In case of electronic transactions or e-contracts the consideration must be there in face of any benefit or service of the user and also for the company who actually offering the benefit to the user.

Forms of Electronic Contract

This is not certain that the legislation only accepts the piece of paper and excludes the electronic alternatives. Electronic Commerce is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. A commercial transaction can be divided into three main stages: the advertising and searching stage, the ordering and payment stage and the delivery stage. Electronic commerce encompasses all kinds of commercial transactions that are concluded over an electronic medium or network, essentially, the Internet.

E-contracts are most commonly entered into when purchases are made via websites, but they can also be formed by exchange of emails representing the offer and acceptance stages required to form a contract. The supplier will usually attach their terms and conditions to their email and these will form the basis of the contract between the parties. There are three main forms of e-contract over internet:

- E-mail/ Browse Wrap
- Click wrap
- Shrink wrap agreement

Email/Browse Wrap

In our recent digital life almost all of us familiar with electronic mail. Any formal letter or official function even academic contacting source majorly doing through e-mail. Via this e-mail the electronic contracts also can be done. The text of an e-mail message is simply the digital equivalent of the letter. One may attach things to it, it needs to be addressed, and it needs to be sent to the desired recipient. E-mail is capable of performing all the functions of normal mail. E-mail can be used to send advertisements as well as offer and acceptance.

²³ Britannica, Politics, Law & Government, Consideration: *Contract Law*. Editors of Encyclopedia Britannica, 2011. <https://www.britannica.com/topic/consideration> (15.03.2022).

In *Partridge v. Crittenden* [1968] it was held that, e-mail is the digital equivalent of a letter sent through the post. All normal functions of postal mail transpire through email. This includes not only the ability to send advertisements or invitations to treat but also equally offers and acceptances.²⁴

In case of browse wrap, the seller gives opportunity to look at the terms of the sale but does not require the user to click on anything to put assent to these terms before paying for the product. For example, the web site may contain a button saying “click here for legal terms,” which the purchaser may click or ignore.²⁵

Click Wrap

Click wrap contracts are most commonly found in the working of the World Wide Web. These types of contracts mainly used for the placing information about a product on the web. This information could be in the form of an advertisement like web advertisement, an invitation to treat or an offer of a product or service for a sum of money. In this process there is a button labelled ‘I Accept’, ‘Submit’, ‘Purchase’, or some other phrase. When the consumer clicks on this button the order is sent to the seller who usually reserves the right to proceed or not to proceed with the transaction.

In *Hotmail Corporation v. Van Money Pie Inc.*, the court was asked to rule on the validity of the ‘click wrap’ contract that the users of the Hotmail service were required to execute. The upheld that the validity of click wrap contracts stating by clicking the ‘I agree’ button on the page where the details of the contract are listed, the parties bind themselves to a contract under the terms contained in that webpage.²⁶

Shrink wrap agreement

Shrink-wrap ascension are those, which are acknowledged by a client when programming is, introduced from a CD-ROM as Microsoft Office programming. Shrink wrap agreements have derived their name from the ‘shrink-wrap’ packaging that usually contains the CD Rom of the Software. The terms and conditions of accessing the particular software are printed on the shrink wrap cover of the CD and to access the CD Rom. At times, supplementary terms are also imposed in such licenses which appear on the screen only when the CD is loaded in the computer.

In *ProCD, Inc. v. Zeidenberg*, Judge Easterbrook held that contracts concluded electronically over the internet may still be valid provided that the party has to have sufficient notice that the transaction they made is governed by the terms that is contained in a separate page on the web site and that they are bound by the terms of such contract. They cannot subsequently claim that they are not bound by the terms of agreement on the ground that they did not read the same when agreeing to the terms.²⁷

²⁴ *Partridge v. Crittenden* [1968], 1 WLR 1204, 2 All ER 421.

²⁵ BLOUNT, 2009.

²⁶ *Hotmail Corporation v. Van Money Pie Inc., et al*, C98-20064, 1998 WL 388389.

²⁷ *ProCD, Inc. v. Zeidenberg*, 86 F. 1996.

Comparative Study About E-Contracts and Traditional Contracts

In response to recent and anticipated future growth in long-distance commerce using electronic media such as the Internet, some commentators have suggested that legal and economic institutions will have to change substantially in response to new technologies of trade, in the same way that they did in response to the major technological and organizational innovations of the 18th and 19th centuries.²⁸ Others have taken a more skeptical position, arguing that recent developments are better viewed as changes of degree rather than of kind, and that they can be accommodated by extending and modifying existing arrangements in a more evolutionary fashion.²⁹ The growth of electronic commerce reflects changes in the relative importance of various institutional transaction costs such as the costs of information and of searching for contractual partners. Accordingly, arrangements that were optimal or at least satisfactory under previous configurations of transaction costs may no longer be so under configurations that will develop in the future. Such cost changes may or may not require adjustment of legal doctrine or statutory provisions, which in most cases merely set default rules around which contracting parties negotiate.³⁰ The comparative study between traditional contract and electronic contract has different perspective like a regulatory perspective that asks what rules the state should set to regulate private contracting.³¹

In internet business, the significance and part of agreement and contract will never be changed, but its type experienced an incredible changes day by day with the development through the digital world. Some differences between traditional contract and electronic contract can be pointed out. Some of them are as following:

Firstly, Conventional contracts occurred in reality, the two sides can bargain face to face, but electronic contract occurred in the virtual space, the two organizations or party would not in any case meet each other when all is done, the whole process happen in the electronic robotized exchanging, or even individuals can't decide if the exchange is moderately. Their character to depend on secret key confirmation distinguishing proof or accreditation body as like the traditional contract use to do.

Secondly, in case of availability of templates depending on different needs and uses of the industry, templates of various kinds of contracts are available online. Parties getting into an agreement need to choose a template, fill details and then attach their e-signatures to it. Whereas in traditional contract, the whole content of the contract is written by a person according to what the parties want. The subject along with the terms and conditions

²⁸ JOHNSON, David R.: The Rise of Law in Cyberspace. *Law and Borders*, Vol. 1 (1996) <https://doi.org/10.5210/fm.v1i1.468> (20.03.2022).

²⁹ EASTERBROOK, Frank H.: Cyberspace and the Law of the Horse. *University of Chicago Legal Forum*, (1996), <https://chicagounbound.uchicago.edu/uclf/vol1996/iss1/7> (30.03.2022).

³⁰ WINN, Jane K. – WRIGHT, Benjamin: *The Law of Electronic Commerce*. Aspen Law & Business, 2001.

³¹ KATZ, Avery W.: *The Economics of Form and Substance in Contract Interpretation*. Columbia Law School, 2004. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1107&context=faculty_scholarship (16.03.2022).

of both parties involved is drafted and for every change, a new draft is created. It could take days and weeks to draft a paper contract.

Thirdly, the electronic contracts are easy to use. As readymade templates are available for various kinds of contracts online, parties are only required to fill the basic details such as name, address, terms and conditions and after parties digitally sign it and the contract is completed. But in case traditional contract, parties need to meet face-to-face to inform each other, discuss about the terms and conditions of the agreement. Then, after the so many modification or drafting the final contract is prepared, parties meet again in order to sign the document. The whole process requires time from both parties.

Fourthly, Digital Contract helps the user by giving them a low transaction cost option. Here, the cost of paper, printing, ink, etc. all get excluded as the process only requires an electronic medium at both ends. But in traditional contracts the cost of labor and material such as paper, printing etc. are involved which increases the cost in the implementation of the agreement. transactional cost of a contract also added in such kind of contract.

Fifthly, traditional contracts are time consuming comparing to the electronic contracts. In traditional contracts parties need to meet face-to-face to agree with the terms and sign the document. But in case of electronic contracts all the process happened through the technological means and done in a blink of eyes.

After having so many benefits of e-contracts comparing to traditional one e-contracts facing so many legal challenges recent days. The parties who come under a contract must have the capacity to do so. If a person does not have legal competence, then the contract stands void. Problem of identify the capacity to e-contract arises because often there are nameless individuals who enter into contracts and there is a possibility that these individuals who agree to the terms and conditions of an e-contract might be minors.

Another vital point is free consent. E-contracts does not provide any party to negotiate with the existing offer as the parties are not aware of each other and there is no chance to modify the offer or terms conditions. The user cannot use any system or software without accepting the terms and conditions. Thus, an e-contract only provides a “take it or leave it” offer not negotiating for ensuring free consent.

Legal Challenges of E-contracts under Law of Bangladesh

For keeping pace with the digital world and present situation, most of the countries over the globe have actualized laws to adopt electronic contacts, in spite of the underlying worries in regards to the same. In context of Bangladesh contracts are regulated under the customary contract law³² which is very unequipped to manage the issue of Electronic Contracts. Around the whole world the computer based transaction creating the atmosphere even in everyday life. The financial matters related to computer or internet

³² KAPOOR, Rajesh: *Avtar Singh's Law of Contract & Specific Relief*. EDC, 2017.

based transaction which depends mostly on electronic contracts has perplexed market analysts around the world.³³

As a developing nation Bangladesh is on its way to become a digital country. In this circumstance, the advantage of internet technology to grow E-commerce has the potential to promote every industry and thereby contribute considerably to the country's macro-economy. However, the country has yet to achieve its E-commerce potential and one of the vital barriers in the way of it is lack of specific legal framework.

The term E-commerce erupt from electronic commerce because the whole transaction conducted through the internet. Daraz, Evaly, Foodpanda etc. are the popular E-commerce websites in Bangladesh nowadays. Generally, internet business in Bangladesh starts with the creation of a website or a public page on a social media network. In the E-commerce sector, Bangladesh lacks of unified legal framework to oversee and monitor the rights of consumers and sellers or service providers.

The Contract Act of 1872, the Sale of Goods Act of 1930, the Consumer's Right Protection Act 2009 and the Competition Act of 2012 provide the regulatory framework for commercial matters, but they all need to be updated to accommodate the various aspects of E-commerce. In the case of online shopping, the buyer and seller engage into a contract before purchasing a good. The nature of such a contract is virtual. Electronic contracting raises a number of valid questions, such as whether an electronic contract is legally binding and to what extent, or whether it can be used as evidence in the event of a breach. However, under Bangladeshi contract law, there is no specific solution relating to such form of contract. The Consumer's Right Protection Act 2009 prohibits misleading people with false advertisements in order to sell a product or service and made it as an infringement of consumer's right but there is no such provision that specifies how such a claim may be established. The Sale of Goods Act of 1930 acknowledges that inspecting goods before purchasing is one of the consumer's rights, but does not specify how this can be done online. The Penal Code of 1860 provides some remedy in general under section 264 to 267 offences relating to fraudulent use of false instrument making or selling false weight or measure. But there is no provision for fraud customers when they refuse to receive the goods in cash on delivery method. As a result, the sellers have to face loss in business, at the same time it demotivates them from online business. The Special Powers Act of 1974 does not deal with the deception of virtual selling but in order to penalize for adulterated food, drinks, dugs or cosmetics this law can be a stringent option. However, cyber threats do exist in online shopping systems. When customers shop online, websites collect their personal data and that risk their privacy. The shopping website, on the other hand, can be hacked. In this regard Information and Communication Technology Act, 2006 can be applied indirectly. Ironically, none of the law applies to online shopping specifically. In 2018, Bangladesh National Parliament also passed Digital Security Act 2018. This act was passed with the aim to give more protection social media, print media

³³ ABHILASH, C. M.: E Commerce laws in Developing countries: An Indian Perspective. *Information & Communication Technology Law*, Vol. 11 (2002).

or any other electronic media.³⁴ But there is no specific provision about the contracting method on the electronic system.

Despite all the irregularities, the most sanguine step by the Bangladesh is National Digital Commerce Policy, 2018 initiative of e-Commerce Association of Bangladesh (e-CAB) what is approved by the cabinet for development of e-commerce sector. It has enormous potentiality to progress the sector but the implementation will take a long time.

Status of Electronic Contracts in International Arena

It is important to note that internet with its all technological developments give us opportunity to act as a global community, advertise and operate transaction all over the world like country to country. For making this kind of global community the adoption of e-contracts through the technological equipment is most important. Many more countries cordially adopted the e-contracts as media of transaction for expanding their business or advertisement. The development of electronic trade has relatively expanded the utilization of electronic contracts as a quicker and imaginative approach to do business i.e. e-commerce. Most nations adjusted their household business enactment to perceive electronic contracts and marks as lawfully legitimate instruments.

Electronic Contracts in USA

The accompanying laws of electronic contracts constitute the essential lawful structure in the United States. The Uniform Electronic Transactions Act (UETA)³⁵ is an imperative enactment material to electronic contracts in USA. Articles 3 and 4 of this Act just applicable to identified with business and government matters to exchanges led by electronic means. The Electronic Signatures in Global and National Commerce Act (E-Sign Act) 2001 perceives the legitimacy of agreements entered electronically and provides a general rule of validity for electronic records and signatures for transactions in interstate or foreign commerce. Uniform Computer Information Transaction Act (UCITA) is an important U.S. set up to the proposed display rules relevant to the development of electronic contracts, particularly to those e-contracts on electronic materials or computer data exchanges.³⁶ Along these lines managing, permitting or exchange of computer programming inside the United States it is imperative to check whether rules of UCITA have been received by the state administrator.

Electronic Contracts in German

Through the use of a rigid regime, the German approach to giving legal effect to electronic contracting. German Digital Signature Act (DSA) 2014 entered into force as Article 3 of the Information and Communication Services Act. This act supported the legal validity

³⁴ Article 19, Bangladesh Digital Security Act 2018.

³⁵ United Nation Commission on International Trade Law (UNCITRAL), Model Law on Electronic Commerce, 1996.

³⁶ AUINGER, H.: Contracts and Orders. *Power Engineering Journal*, Vol. 15 No. 1 (2001).

of digital signatures in electronic commerce. Further technical regulations followed later that year in the Digital Signature Ordinance.

Electronic Contracts in France

As a European Union (EU) Member State, France is governed by Regulation No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market. The use of electronic signatures in electronic contracts is increasing in France, especially in the context of e-commerce. Certificate-based digital signatures, such as qualified electronic signatures (QES), are mainly reserved for specific regulated business activities such as those involving notaries, lawyers, banking institutions, and bailiffs, where the evidential nature of the signature has a significant importance.³⁷

Electronic Contracts in Malaysia

Despite the fact that internet business is developing at a critical rate, various hindrances keep on hampering its improvement. One hindrance identifies with development of e-contract. There remains vulnerability whether the conventional standards of agreement law can be adjusted to the necessities of electronic contracting. The electronic contract is essentially not quite the same as conventional contract which trigger different new lawful issues even at the underlying phase of the agreement.³⁸ In light of Malaysian legitimate practice and in correlation with United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce and European Union Directives on internet business, this country tries to investigate and distinguish customer issues concerning the development of e-contracts. This incorporates the talk on the production of legitimately enforceable understanding, the suitability of the postal run and its application to email, the need of composed contract and additionally computerized signature and the vulnerability of where and when the e-contract is framed. Malaysian enactment on arrangement of e-contract including the Contracts Act 1950, Sale of Goods Act 195, Electronic Commerce Act 2006 and the Digital Signature Act 1997 and the ampleness of the current law in ensuring e-buyers.

Conclusion

Even though our existing contract laws are predicated upon the traditional paper-based contracts, it has been able to accommodate evolutions in communication and the way contracts are formed, for instance, the development of telephones, faxes, and telex. Hence, the emergence electronic communication is therefore not entirely different from other modes of communication and can also be accommodated by the existing contract law.

³⁷ Electronic Signature Laws & Regulations in the EU, EU Trust Services Dashboard. <https://webgate.ec.europa.eu/tl-browser/#/tl/FR>. (16.03.2022).

³⁸ REED, Kathleen et al.: *Contract Law for Paralegals: Traditional and E-Contracts*. Pearson Higher, 2012.

Electronic commerce, by its nature, goes beyond borders and so it is important to harmonize the laws that regulate electronic commerce. The United Nations has taken a commendable step in that direction. However, it should have gone ahead to make provisions addressing the issue of who makes the offer and who accepts the offer in electronic commerce, and when an acceptance becomes effective.

Though some countries like Bangladesh are lagging behind in taking definitive steps to remove the obstacles to the facilitation of electronic commerce. But day to day development in digital world make them realize the importance of making e-contract more inclusive in state law. This way businesses and electronic consumers can benefit from this fast and highly convenient means of transacting business.

KISS, LAURA OLGA

Everything that artificial intelligence can NOT do

“A judge, like any other mortal, when he thinks, his whole personality is always involved, and this brings colour to every part of it.”

– Jerome Frank¹

Introduction – A situation map of the psychological and cognitive limitations of AI for the judiciary in 2022²

Artificial Intelligence (AI for short) and its potential applications in various industries has become a rather popular topic by the early 2020s. The topic is highly researched today and a lot of projects, public and market funding is flowing into this area of research and development. Artificial intelligence and “...” – you could actually insert anything else here – are of great interest to researchers and laic people alike.

In this paper, I will not attempt to give a precise definition of AI, but in summary, AI is a generic term used to describe a disruptive technology that includes, among others, machine learning, image analysis, voice description, facial recognition, virtual assistance, etc., and is essentially capable of performing human tasks.³

It is natural and clear that the possibilities offered by this new technology are astonishing scientists and industry alike, and everyone is waiting with bated breath to see what AI can DO.

But it is equally natural and human to fear AI at a societal level, to fear the extent to which it will change our lives, the impact it will have on, for example, the labour

¹ FRANK, Jerome: *Bíráskodás az elme ítélőszéke előtt (Válogatott írások)*. Szent István Társulat az Apostoli Szentszék Könyvkiadója, Budapest, 2006. 60–61.

² Thanks to Noémi Császár-Nagy for her help with this study and for the idea of the study itself.

³ SIMON, Herbert A.: Cognitive science: The newest science of the artificial. *Cognitive Science*, 4(1) (1980) 33–46. https://doi.org/10.1207/s15516709cog0401_2 (01.05.2022).

market or our human relationships. The extreme and artistic processing of this fear can be observed in many films and books that fall into the category of science fiction, such as *Ex Machina*, *Her*.

Since artificial intelligence also means that the software or machine in question has intelligence and capabilities that are similar to, or even superior to, human intelligence, the question automatically arises: how are we humans different? How are we more, how are we less? What is it that can be considered exclusively human?

Although I fully agree with the statement that the research and results that are of economic and scientific value are mainly those that deal with what artificial intelligence is capable of, I believe that it is also worth examining, especially from a human point of view, what it is not capable of, at least at the moment.

It is important to note here that this paper is written in 2022, so I can give you a picture of the situation at that point in time, given that with the rapid development of technology, it is easy for what is being said here to become outdated in a few years' time – but that is the beauty of research, that with continuous development, the old findings are overturned and replaced by new ones. At the same time, in compiling the list of properties that can be considered limitations of AI, I have sought to list those that are of truly exclusively human value and that, presumably, will not be eroded by AI developments in the future – either because they are of no economic value or because they are truly unmodifiable and unprogrammable properties.

The study relies heavily on the findings of the EMEA Partner Conference held by Right Brain Future in Vilamoura, Portugal in 2018, but is novel in that it fits into the larger concept I have been researching – the relationship between court proceedings and AI. At the conference they classified the following as human characteristics and skills: perception, speech clarity, near vision, fine manual dexterity, selective attention, problem sensitivity, oral and written expression, oral and written comprehension, inductive and deductive reasoning, creativity, category flexibility, complex problem-solving, judgment, applying expertise, active listening, management, critical thinking, ethics, handling ambiguity, operations analysis, persuasion, empathy, emotional intelligence, social perceptiveness.

Classified as machine features: coordination, precision, speed control, strength, basic speech, sound localization, speech recognition, dynamic flexibility, night and peripheral vision, reaction time, stamina, regular object manipulation, scalable processing capability, fact recall, computation, routine reading comprehension, equipment operation and repair, pattern recognition, impartiality, logic, system design, novelty detection, structured interference, data discovery and analysis.

In this study, I will focus only on the analysis of the most necessary qualities (emotional intelligence, creativity, neothenia) for legal and, in particular, judicial work.

One of my main research questions is whether it is conceivable that one day artificial intelligence-based software could replace human judges in the conduct of court proceedings. In examining this question, particular attention should be paid to the limitations of artificial intelligence.

Thus, the study will be structured as follows: I will describe what we currently know that AI cannot do compared to humans, and then I will examine the role that this feature plays or can play in the work of a judge – or, more broadly, of any lawyer. At the end of the thesis, I will attempt to map the relationship between AI developments in future court proceedings and human judges, taking into account the legal framework that we currently know.

The exclusively human characteristics presented in this study:

1. emotional intelligence
2. creativity
3. neoteny
4. reasoning, reasonability
5. social perception and social sensitivity

Emotional intelligence

Emotional intelligence, according to the best known approach, essentially consists of three abilities:

1. the perception and expression of emotions
2. the regulation of emotions
3. the use of emotions.^{4,5}

Perceiving emotions is the ability to recognise emotions in people, while expressing emotions is the reverse: being able to express emotions in a way that is recognisable to others.

In comparison, a further step is the regulation of emotions, i.e. the ability to learn to control our own emotions, to choose in which situations and in front of whom to express them, and when, in which situation and in front of whom it is not appropriate to express a particular emotion.

The third stage is the use of emotions, including the ability to motivate ourselves or others, to plan with and through them, to achieve our goals. This is essentially the ability to use our emotions to influence ourselves and others.

Artificial intelligence as we know it today has only a limited capacity to exercise the skills and abilities that we understand under the umbrella term of emotional intelligence. Although emotion recognition can be taught, for example through image recognition, emotion detection is a much more complex task and is or could be used in the design of humanoid robots in general.

For example, Sophia, one of today's best-known humanoid robots, developed by Harson Robotics using deep learning, which was granted citizenship in Saudi Arabia in

⁴ SALOVEY, Peter – MAYER, John D.: Emotional Intelligence. *Imagination, Cognition and Personality*, Vol. 9 Issue 3 (1990) 185–211. <https://doi.org/10.2190/DUGG-P24E-52WK-6CDG> (01.05.2022).

⁵ CARUSO, David. R. – MAYER, John D. – SALOVEY, Peter: Relation of an ability measure of emotional intelligence to personality. *Journal of personality assessment*, 79(2) (2002) 306–320.

2017, can recognise⁶ more than 60 emotions and express them with its built-in “facial muscles”, according to its developers and its own description.⁷ Sophia, for example, can smile and thus show joy. Future application areas would include healthcare, customer service and education, but it is important to know that the full spectrum of emotions has yet to be mapped and programmed, and some research suggests that Sophia’s effect on humans is rather negative, which is a major drawback.⁸

The use of emotion regulation and emotion at the next level of artificial intelligence is a very remote and limited possibility, even compared to emotion recognition and expression.

However, it would be a mistake to think that the teaching of emotions in AI is an area for negligible development. Generally speaking, recent research shows that higher emotional intelligence leads to greater success (satisfaction, better relationships, outstanding careers).^{9,10} Accordingly, in order to achieve abovementioned success, active research is being carried out, for example in the health sector,¹¹ to develop virtual carers who have the ability to be emotionally intelligent, i.e. to recognise the emotional needs of the person they care for and to influence their recovery by expressing their own emotions, and in the hospitality sector, where the reconciliation of emotional and AI development is also a priority.¹²

A popular approach¹³ is to divide AI into three groups based on the use of emotional intelligence:

1. *analytical AI*: uses cognitive intelligence and learning, mainly for making future predictions
2. *human-inspired AI*: in addition to cognitive intelligence, it now also uses emotional intelligence, recognising people’s feelings and incorporating them into its operations
3. *humanized AI*: uses cognitive, emotional and social intelligence, has self-awareness

Today, we are not aware of the third type of AI, which makes full use of social intelligence and emotional intelligence. The most common type is analytical AI.

⁶ https://www.youtube.com/watch?v=YxyGwH7Ku5Y&ab_channel=GamingPlus (05.05.2022).

⁷ FARAJ, Zanwar et al: Facially Expressive Humanoid Robotic Face. *HardwareX*, Vol. 9 e00117 (2021).

⁸ CHUAH, Stephanie Hui-Wen – YU, Joanne: The future of service: The power of emotion in human-robot interaction. *Journal of Retailing and Consumer Services*, Vol. 61 (2021).

⁹ AMDURER, Emily et al: Long term impact of emotional, social and cognitive intelligence competencies and GMAT on career and life satisfaction and career success. *Frontiers in Psychology*, 5 (2014) 1447.

¹⁰ AUSTIN, Elizabeth J. – SAKLOFSKE, Donald H. – EGAN, Vincent: Personality, well-being and health correlates of trait emotional intelligence. *Personality and Individual Differences*, 38(3) (2005) 547–558.

¹¹ BROWN, Julia E. H. – HALPERN, Jodi: AI chatbots cannot replace human interactions in the pursuit of more inclusive mental healthcare. *SSM Mental Health*, Vol. 1 (2021).

¹² PRENTICE, Catherine – LOPEZ, Sergio Dominique – WANG, Xueqong: Emotional intelligence or artificial intelligence – an employee perspective. *Journal of Hospitality Marketing and Management*, Vol. 29 (2020).

¹³ KAPLAN, Andreas – HAENLEIN, Michael: Siri, Siri, in my hand: Who’s the fairest in the land? On the interpretations, illustrations, and implications of artificial intelligence. *Business Horizons*, 62 (2019) 15–25.

However, the use of human-inspired AI is becoming increasingly popular: for example, Walmart, a major US chain, has recently used facial (and emotional) recognition to identify how unhappy customers are with the number of people waiting in line,¹⁴ and then used this information to decide whether to open a new checkout, or to identify shoplifting using facial recognition.¹⁵

In a recent and domestic example, a Hungarian bank used artificial intelligence-based software to recognise the emotional state of its customers, and then used speech recognition and speech evaluation system to call back its customers as follows. The bank used the results of the analysis provided by the system to determine which dissatisfied customers should be recalled, including by analysing the emotional state of the speaker. The speech signal processing based on artificial intelligence was used to automatically analyse the keywords in the list and the emotional/mood of the speaker. The results of the detected keywords and emotions were stored by the bank associated with the caller. The voice analysing software ranked the calls based on the above, which was in effect a recommendation as to which caller should be called back as a priority. This data was also stored in the voice analysis software linked to the call. By reviewing the data, the bank's senior staff decided which customers to call back.¹⁶

The National Office for Data Protection and Freedom of Information has “rewarded” the bank's innovation using artificial intelligence based on emotional intelligence with a record fine of HUF 250 million, which is particularly significant as it is the first fine in Hungary for the unlawful use of artificial intelligence.

In the case of the abovementioned examples, we can already speak of classical emotional intelligence – artificial intelligence that recognises emotions – but not yet of artificial intelligence at the second or third levels – human-inspired and humanized AI.

Moving on to the world of law and the courtroom, we can see that emotional intelligence is also essential for the exercise of the judiciary: in the course of their work, a judge has to settle disputes between persons and in doing so, they must recognise the aims, motivations and sensitivities of the parties and take all these into account when making the final decision. The role of the judge is extremely complex: a judge is essentially active, interacts with the parties through the proceedings, seeking to reach a settlement, sometimes mediating, conducting and maintaining order, providing general and specific information, conducting professional discussions with other judges and other parties involved in the administration of justice, etc.¹⁷

¹⁴ <https://us.fashionnetwork.com/news/walmart-uses-facial-recognition-technology-to-spot-disgruntled-customers.852351.html> (2022. 05. 05.)

¹⁵ <https://fortune.com/2015/11/09/wal-mart-facial-recognition/> (05.05.2022).

¹⁶ Report of 2021 of Hungary National Authority for Data Protection and Freedom of Information. NAIH-7350/2021., NAIH-85/2022 döntések. *NAIH beszámoló a 2021. évi tevékenységről* (05.05.2022).

¹⁷ NAGY, Adrienn: A mesterséges intelligencia és digitalizáció jelentősége és lehetséges hasznosítási területei az igazságszolgáltatásban. Bevezető gondolatok a mesterséges intelligencia igazságszolgáltatásban történő alkalmazhatóságáról. *Infokommunikáció és jog*, 2 (2020) 75. E-különszám.

In addition, empathy is a key attribute of emotional intelligence in judicial work, enabling judges to understand how their decisions may affect the feelings and actions of others and to take into account the views of the parties when making decisions.

In English, judicial responsiveness is the term used in the literature to describe the emotional intelligence that a judge needs in his or her judgement: to make decisions that affect human lives in a way that is intuitive, empathetic and compassionate, always bearing in mind the legal framework, and which also requires creativity (see below).¹⁸

It can therefore be concluded that artificial intelligence in its current form, which is only capable of recognising and identifying emotions, does not allow the development of software that can fully replace human judges with a broad spectrum of emotional intelligence, who, in addition to recognising emotions, must pay increased attention to the regulation of emotions and the use of emotions in the exercise of their work.¹⁹

In parallel with technological progress, there are increasingly strong voices arguing that lawyers should work on developing their emotional intelligence rather than their cognitive skills and knowledge in order to perform their tasks effectively, since cognitive tasks such as the immediate search for the applicable law or case law can be effectively performed by artificial intelligence, but not the satisfaction of the client's emotional needs.^{20,21}

It can be concluded from the above that the resolution of legal cases cannot be automatic, as it is rare that there is only one good answer to a question. The main goal to find the best possible answer and personalised solution to the legal question or dispute of the parties concerned, it is necessary to fully understand their situation, motivations and goals, for which a high level of emotional intelligence is essential.

Furthermore, it is of paramount importance for judicial proceedings that clients feel heard and understood by the court – beyond, of course, the requirements of a fair trial – because it has been shown that they are more likely to accept decisions and consequences that affect them if they are involved in a process that they personally consider to be fair.²²

Creativity

The second trait presented exclusively human is creativity. Creativity refers to the capacity for original, inventive, constructive or divergent thinking that enables an individual

¹⁸ SOURDIN, Tania – ZARISKI, Archie: *The Responsive Judge – International Perspectives*. Springer, 2018.

¹⁹ BARNA, Lili – JUHÁSZ, Dorottya – MÁROK, Soma: Milyen a jó bíró? *Miskolci Jogi Szemle*, 13. évf. 1. sz. (2018).

²⁰ CARREL, Alyson: Legal Intelligence through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional. *Georgia State University Law Review*, 35 (2019) 1153.

²¹ BECK, Megan – LIBERT, Barry: Professional Transitions – The Rise of AI Makes Emotional Intelligence More Important. *Harvard Business Review*, (2017). <https://hbr.org/2017/02/the-rise-of-ai-makes-emotional-intelligence-more-important> (05.05.2022).

²² THIBAUT, John – WALKER, Laurence: *Procedural justice: a psychological analysis*. Lawrence Erlbaum Associates, 1975. 150.

to generate new ideas, new concepts, new associations, new conclusions, and thus to contribute to the creation of new solutions.

Creativity can therefore be broken down into elements:²³

1. novelty
2. combination
3. expression
4. value

It is a skill that is difficult to define and develop even by humans, and programming it is perhaps even more difficult. IBM has described the teaching of AI to be creative as a development on the scale of the moon landing.²⁴

Creativity as a skill is particularly important in the arts – there is an active debate at the moment about whether AI can be an author, for example in the case of software developed by machine learning. So far, Australia is the first country whose federal court has decided to recognise AI as an inventor (quasi-author),²⁵ but this has not led to a major breakthrough in the legal regulation of AI internationally.

Overall, AI ‘works’ are currently in their infancy, as can be seen from the rather amusing sequel to ‘Harry Potter and What Looked Like a Pile of Ashes’,²⁶ which was written by AI rather than having artistic merit.

However, it should be pointed out that there have been advances in the creativity of AI in a number of areas. Combination, as an element of creativity, is already a strong capability of AI today. This means that it is capable of creating random and therefore new combinations – for example, writing haiku²⁷ or writing a film²⁸ – but not yet fully capable of representing value, although it should be noted that the artistic value of something is a subjective category. In his study, Deniz E. Kurt concludes that in order to answer the question of whether AI can be considered creative and therefore artistic, a paradigm shift in our general attitude towards art and creativity is needed.²⁹ It is interesting to note that this paradigm shift is also highlighted by Krisztina Karsai as a key element in understanding the relationship between AI and (criminal) justice.³⁰

²³ BODEN, Margaret A.: *The Creative Mind: Myths and Mechanisms*. Second Publication, Psychology Press, 2004.

²⁴ <https://www.ibm.com/watson/advantage-reports/future-of-artificial-intelligence/ai-creativity.html> (05.05.2022).

²⁵ Federal Court of Australia, *Thaler v Commissioner of Patents*, 2021 FCA 879 <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0879> (05.05.2022).

²⁶ <https://botnik.org/content/harry-potter.html> (05.05.2022).

²⁷ <https://opensea.io/assets/ai-haiku-poems> (05.05.2022).

²⁸ https://www.youtube.com/watch?v=LY7x2Ihqjmc&ab_channel=ArsTechnica (05.05.2022).

²⁹ KURT, D. E.: *Artistic Creativity in Artificial Intelligence*. Thesis of Radboud University, 2018.

³⁰ KARSAI, Krisztina: *Algoritmusok és büntető igazságszolgáltatás*. In: Török, Bernát – Zódi, Zsolt: *A mesterséges intelligencia szabályozási kihívásai*. Ludovika Egyetemi Kiadó, Budapest, 2021. 357–386.

What can be concluded from the above is that creativity and sensitivity in the arts are based on human indoctrination to such an extent that they are very difficult to learn and thus to teach. It is of course possible to show certain melodies, images, texts to software based on artificial intelligence by categorising artists and non-artists, but the categorisation itself is highly questionable because of its subjectivity. It is still a further, and at the moment very far-reaching, step to teach artificial intelligence to create something new and artistically valuable on its own.

To return again to the question at the heart of our topic, creativity is an essential element of legal thinking, i.e. the ability to find multiple solutions to a situation.

In this context, creativity arguably plays a key role in judicial work,³¹ since this is where the application of the law itself takes place, which in fact involves a high level of active (textual) interpretation and abstraction. All this can be established without going into the extent of the interpretative freedom of judges in certain legal systems, its permissibility, or the differences in interpretation and difficulties that usually arise between legislation and the application of the law.

From the point of view of the work of judges, it is not important that AI develops a completely new and valuable legal solution for a given case, but it is essential that it always develops its decision with an “open mind”, taking into account the characteristics and parties involved in the case, and not just using an automatic panel of inputted facts for each case or type of case.

This ability is of particular importance, for example, in the exercise of equity, where the judge is free, as it were, to make their own decision according to the circumstances and discretion given by the law. Although we can observe a tendency towards a narrowing of the scope of equity (especially in the Hungarian legal system for example), this does not mean that we are talking about an area that has been completely lost – its importance in judicial work, regardless of its extent and its expression in law, is outstanding, and therefore, until artificial intelligence is able to exercise it properly, it cannot be fully automated.

Neoteny

Perhaps the most powerful human trait not currently available to AI-based software is neoteny, also known as the ability to progressively rejuvenate or juvenisation.

By this term we mean psychologically the ability of an adult of a given species to retain some of the characteristics of younger individuals of that species, or in other words the ability of a species, despite having reached and surpassed a certain level of development, to return to its previous level of development if it is advantageous to it in the situation.

Neoteny³² can be most simply illustrated by an example: in children, once they have reached potty training, when a new child – not yet potty trained – arrives in the family,

³¹ OWENS, B. Robert – MERRIMAN, Ben: Habit and creativity in judges’ definition and framing of legal questions. *Theory and Society*, 50 (2021) 741–767.

³² BRIN, David: How might AI Come About? – Different Approaches and Their Implications for Life in the Universe. *Artificial Axiom*, Vol. 2 Issue 1 (2016) 117.

the older child suddenly “regresses” and needs to be diapered again. The reason is that the older child sees that their parents are spending more time with the new arrival than with them, also because the younger one is being diapered, and so, in order to get their parents’ attention again, they decide to return to the previous level of development, again only diapering, and so their parents spend more time with them again, which is evolutionarily advantageous for them, even though in terms of actual development they are actually regressing.

And when does a judge need neoteny?

As I have already mentioned in the emotional intelligence section of this paper, it is very important for a judge, in the exercise of their judicial activity, to be able to empathise with their clients, i.e. to be able to put themselves in their shoes.

In addition to empathy, a further step must be taken when, in a given case, a child is involved in the court proceedings and the judge has to interpret their presentation or testimony: they must go back to the child’s own thinking in order to understand them, since in a child reality and imagination are not yet clearly separated, and their testimony is a mixture of fairy-tale impressions and truth, which requires an understanding of the child’s being and thinking.

Artificial intelligence-based software³³ currently used in the justice system selects the relevant information and facts from the information it obtains, whether extracted from written documents or oral presentations, and then makes a decision or a recommendation based on that information.

However, without the capacity for neoteny, they cannot filter information on the basis of what is said by whom, for example a child, nor can they interpret it in such a way that the child’s testimony is consistent with reality.

Explainability and justification

A well-known problem in the application and control of artificial intelligence-based systems is the frequent lack of explainability, or in other words the “blackbox” phenomenon, the essence of which Pál Vadász summarised as follows: “the operation of the nowadays widespread algorithms operating multilayer neural networks is very difficult to understand, and only the input and output can be easily controlled. The algorithm handles millions of input points, which are weighted by the model until the expected output is literally produced, because the process is self-directing”.³⁴ So essentially, in automated decision-making, artificial intelligence repeatedly makes decisions where it is not entirely transparent – even to the software developers themselves – exactly how the system made that decision.

³³ KÁLMÁN, Kinga – KISS, Laura Olga – SZENTGÁLI-TÓTH, Boldizsár: *Mesterséges intelligencia alapú szoftverek a világ bíróságain: gyakorlati tapasztalatok, perspektívák és kihívások*. In: Digitális Jogalkalmazás. 2022. (megjelenés alatt).

³⁴ VADÁSZ, Pál: *Elkerülhető, hogy a robotok diszkrimináljanak bennünket. A mesterséges intelligencia szabályozási kihívásai*. In: Török, Bernát – Zódi, Zsolt: *A mesterséges intelligencia szabályozási kihívásai*. Ludovika Egyetemi Kiadó, Budapest, 2021. 89–110.

One of the most ambitious goals of computer scientists today is the development of explainable AI (or XAI), which operates in such a transparent way that the human user trusts the output and outcome offered by the system. This is particularly emphasized in AI-based decision making and thus also in our topic, decisions in judicial proceedings, where adequate reasoning is an essential requirement.

The most obvious and primary function of a judicial reasoning is to convincingly demonstrate to the relevant audience (parties, appellate court or even the wider public) the professional soundness of the judgment and its freedom from any arbitrariness.³⁵

In its case-law, the European Court of Human Rights has emphasised, inter alia, the following points in relation to the proper reasoning of judicial decisions: courts must justify their actions by the reasons given for their decisions,³⁶ the reasons must be such as to enable the parties to effectively appeal against the decision,³⁷ and the courts must deal individually and expressly with submissions that are of decisive importance for the proceedings.³⁸

From the above, it can be concluded that in judicial decision-making, if AI-based software is involved in the decision, it must be ensured that this AI is XAI, i.e. that its operation is explainable and understandable to the parties.

Of course, this is not a requirement in itself, and we must not forget that the aim of guaranteeing the right to a fair trial is not a per se requirement, but serves the purpose of resolving disputes in a calming manner, so it is conceivable that in the future, because of the advantages offered by artificial intelligence (e.g. efficiency), our legal system will also break away from the current strict interpretation of this requirement and, at the cost of a paradigm shift, will interpret it more flexibly. However, it seems certain that the proper reasoning of judicial decisions will require the development of an AI-based support system, which at least has the ability to track and show what elements it has considered relevant and how it has weighed them in its decision-making, so that the decision can be interpreted and, where appropriate, challenged by the parties to the proceedings.

At the moment, there are still very few AI-based software systems in 'live' use in the justice systems that can act as autonomous decision-makers, but it is already apparent that the lack of explanatory power is causing problems.

One example of this is COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) system in the US, which is designed to assist judges in the correctional field in deciding whether or not a particular prisoner is worthy of parole.

³⁵ BENCZE, Máttyás – KOVÁCS, Ágnes: „Nem foghat helyt” – Az Alkotmánybíróság az indokolási kötelezettség teljesítéséről. *MTA Law Working Papers*, 10 (2018).

³⁶ European Court of Human Right, Souminen vs. Finland. <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-61178%22> (05.05.2022).

³⁷ European Court of Human Right, Hirvisaari vs. Finland. <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-59682%22> (05.05.2022).

³⁸ European Court of Human Right, Ruiz Torija vs. Spain and Hiro Balani vs. Spain. <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-57909%22> and <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-57910%22> (05.05.2022).

Essentially, it is a risk analysis software tool that decides on the risk of recidivism of a person based on a set of criteria such as age, gender, criminal record or criminal history, education, occupation, labour market situation, livelihood, assets, housing, family circumstances, harmful addictions. The tendency of COMPAS to discriminate against black people was quickly exposed and the system and the authorities³⁹ applying it were sharply criticised,⁴⁰ inter alia because the discriminated persons did not understand why exactly the judge applying COMPAS had concluded that they did not deserve to be released on parole. This problem could also be solved by the use of an artificial intelligence-based system that is more transparent than COMPAS.

At the moment, the lack of explanatory algorithmic transparency⁴¹ and the discriminatory nature of AI is one of the most serious arguments against the introduction of AI in judicial decision-making, and although judgments made by human judges are not always free from vagueness and inconsistency, it can be said that, at a societal level, there is currently greater confidence in such 'traditional' judgments, i.e. those made by humans, to ensure legality, rather than judgments made by a system whose operation and the decision it makes are often not entirely clear to its developers.⁴² This is evidenced by surveys showing that people are much less forgiving of an error made by an automated decision making (ADM) system than of an error resulting from human error, even if a given system is overall more accurate and performs better than a human.⁴³ This phenomenon is called algorithm aversion, and it is a phenomenon that must be taken into account when considering the introduction of AI as a decision maker in its own right.

Social sensitivity and social perception

Another trait highlighted by Right Brain Future and labelled as exclusively human was social perceptiveness, which also fits into the broader category of social sensitivity.

Social perceptiveness is the ability of an individual to recognise the needs, goals and feelings of others,⁴⁴ i.e. qualities that cannot be observed directly from the outside. Social or societal sensitivity goes beyond this and involves the ability of the individual to

³⁹ YONG, Ed: A Popular Algorithm Is No Better at Predicting Crimes Than Random People. *The Atlantic*, 1 (2018) <https://www.theatlantic.com/technology/archive/2018/01/equivant-compas-algorithm/550646/> (05.05.2022).

⁴⁰ LARSON, Jeff et al: How we Analyzed the COMPAS Recidivism Algorithm. *Pro Publica*, 2016. <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> (05.05.2022).

⁴¹ RODRIGUES, Rowena: Legal and human rights issues of AI: Gaps, challenges and vulnerabilities. *Journal of Responsible Technology*, Vol 4 (2020).

⁴² DIETVORST, B. J. – SIMMONS, J. P. – MASSEY, C.: Algorithm aversion: people erroneously avoid algorithms after seeing them err. *Journal of Experimental Psychology: General*, 144 (2016) 114–126.

⁴³ ARAUJO, Theo et al: In AI we trust? Perceptions about automated decision-making by artificial intelligence. *AI and Society*, 35 (2020) 611–623.

⁴⁴ GILBERT, Janelle A. – KOTKE, Janet L.: *Developing a Measure of Social Perceptiveness*. Annual Conference of the Association for Psychological Science. May 24, 2009, San Francisco https://www.researchgate.net/publication/255649787_Developing_a_Measure_of_Social_Perceptiveness (05.05.2022).

identify, perceive, recognise and contextualise phenomena in the community, in social interactions.

Social sensitivity or social perception is accompanied by a number of additional social skills, such as emotional intelligence or empathy, as discussed in more detail above, which people acquire during their development mostly through their ability to empathise with the situation of others because they have experienced the situation or similar situation or can imagine how it might feel for others.

Although the relationship between artificial intelligence and social perception and social sensitivity is still an area of research, the results to date, or lack thereof, suggest that there is still work to be done to design software that has at least human-like capabilities in this area.

At the same time, artificial intelligence may benefit from the fact that it is forbidden to prejudge the judgement of a court, i.e. to express a definite opinion before the judgement is given which could lead to an inference as to the final judgment of the case. Of course, because of their social perception and social sensitivity, a human judge will have some perception of the parties and the outcome of the case at an early stage, but it is of the utmost importance for the right to a fair trial that he maintains their impartiality throughout the proceedings. From the point of view of objectivity, an AI-based software is in a better position because of its lack of emotional and social skills, as explained above.

However, despite this undeniable advantage, it can be said that the above qualities of social perception and social sensitivity are, and are likely to remain, an important element of judicial work, as highlighted in a study on the qualities of a 'good judge': 'the judge cannot remain in an ivory tower, they must be aware of the fundamental social context and the fundamental problems of society,⁴⁵ particularly because he takes decisions that affect the members of society individually and collectively, and he must be aware of the consequences of those decisions. In addition to social skills, the literature^{46, 47} highlights sensitivity, a sense of humour, a good knowledge of human nature and a mature personality as essential – human – qualities for judging people, qualities which, at present, can only be associated with people.

Summary

Our legal system and our society are currently based on a justice system run by human judges, in which judges with these qualities – emotional intelligence, empathy, creativity, neoteny, transparent reasoning, social perception and social sensitivity – are indispensable. Artificial intelligence in 2022 will not have these qualities at all or not to the required extent, which is why fully automated decision-making, artificial intelligence as an autonomous decision-maker in judicial proceedings – in full compliance with the rights of due process as currently understood – is highly unthinkable in the near future of Europe.

⁴⁵ BARNA–JUHÁSZ–MÁROK, 2018.

⁴⁶ TAFT, R.: The ability to judge people. *Psychological Bulletin* 52(1) (1955) 1–23.

⁴⁷ LETZRING, Tera D.: The good judge of personality: Characteristics, behaviors, and observer accuracy. *Journal of Research in Personality*, 42/4 (2008) 914–932.

What can be predicted is that, if the legal guarantees we know and have developed are to continue to be enforced with the same emphasis and unchanged, artificial intelligence-based support systems – of which there are indisputable and abundant – will be the only way to achieve this, not discussed in this study, will be increasingly widely used in justice systems. However, the human judge, as an actor with exclusively human qualities, will continue to be an active participant and an indispensable control of judicial proceedings.

Conclusion

It is becoming more and more well known what artificial intelligence is good for, in how many areas, including the field of law, can make our lives easier. The aim of the research and the lecture to be held as a result of it is based on thinking backwards and exploring what artificial intelligence is not capable of according to the current state of science. It explores the topic of how artificial intelligence could be used in court proceedings.

The research is mainly based on the examination of psychological-cognitive abilities, and the results highlight that artificial intelligence does not possess the following exclusively human traits: emotional intelligence, empathy, creativity, neoteny, transparent reasoning, social perception and social sensitivity.

LYDORF, CLAUDIA

**Legal online-databases as subject of the law
and as instruments of legal professionals**

Introduction

In the digital environment of law legal databases are important instruments in the work of lawyers, scientists, judges and state attorneys as well as in the work of state authorities. Their use is common in every legal employment and in every focus of legal activity. Even the interested public is using legal databases for their own information needs, especially in the times of the corona pandemic.

The focus of the paper will be on legal online-databases in Germany as they are representative for the main online information sources for legal professionals. Offline-databases, available as physical embodiment on CD, DVD or CD-Rom, are not included in this context as they have been superseded by online databases. The following paper intends to give an overview of the legal framework that applies to German online-databases, mainly determined by the Act on copyright and ancillary copyright (Gesetz über das Urheberrecht und verwandte Schutzrechte (UrhG); hereafter: Copyright Act), whereby the influence of the European law on the German law is likewise considered. The paper ends with giving a short overview how the expected future development of legal databases in Germany is driven by the field of tensions between the needs of the legal professions and new possible uses of databases offered by technical progress.

Access to legal information

Let's start with a definition of the term digital environment: Digital environments are all information environments that are mediated via the World Wide Web or similar mobile devices. They include in particular those environments that facilitate the discovery of and the search for information, people and resources.¹

¹ <https://www.igi-global.com/dictionary/toward-a-working-definition-of-digital-literacy/42879> (30.05.2022).

The access to information in general is a valuable asset but the access to legal information is indispensable for legal professionals. Therefore the right to access information held by public authorities is regulated inter alia in article 5 Grundgesetz, in the Informationsfreiheitsgesetz and the Datennutzungsgesetz. For the same reason the right to access effective legislative texts is not inhibited by restrictive rules and legislative texts are not protected by the German copyright law. As everybody needs to access and use them free of charge and restrictions section 5 Copyright Act regulates that “*Acts, statutory instruments, official decrees and official notices, as well as court decisions and official head notes of court decisions do not enjoy copyright protection.*” As legal databases are expensive commodities when it comes to the instruments of legal business one might expect that the manufacturers of legal databases would leave the legislative texts to the world wide web and concentrate their whole effort on copyright protected works to cover the immense costs of providing a database by charging the user for expensive content.

Let’s take a look on broadly known legal databases.² One large legal database is Eur-Lex – the database of the European Union. Among other things one can search here for the Official Journal – the Journal of Laws for the EU – which includes among other things the whole of the applicable law but one can also search for court decisions, agreements with states not part of the EU and preparatory legal acts. In Hungary the CompLex publishing house (CompLex Kiadó Kft.) is not only publishing professional literature for jurists, but also distributes digital information in the form of a legal database. It belongs to the Wolter Kluwer Group and so has a close link to the developments in Germany.³

To describe the situation in Germany let’s start with C.H. Beck GmbH, which has multiple links to many countries of Central and Eastern Europe. Beck was founded 1763 and belongs to the oldest German institutions in the publishing industry. It is still run by the Beck-family, who gave it its name. The publishing house splits in two operational sections: one deals with publications concerning Law – Taxes – Economy (= Recht – Steuern – Wirtschaft) and the other concerns the disciplines Literature – Non-Fiction Literature – Science (Literatur – Sachbuch – Wissenschaft). The publishing houses C.H.Beck Warschau and C.H.Beck Prag exist since 1993, to be later followed by C.H.Beck Bukarest. Having started in the 18th century first as a printing house and now coming from a long history as a publisher, Beck launched the platform beck-online in 2001. The platform offers access to digital materials like German law, German court decisions and the digital available product range of the publishing house Beck, namely their legal journals.⁴

² For the legal protection of databases created by scientists in the context of their research projects see: KUSCHEL, Linda: Urheberrecht und Forschungsdaten. *Ordnung der Wissenschaft* 1 (2020) 43.

³ SZILAGYI, Emese: *Leistungsschutzrecht für Verleger? Eine rechts-tatsächliche Untersuchung zur zur Wiederherstellung des Interessenausgleichs zwischen Verlegern, Urhebern und Allgemeinheit.* Herbert Utz Verlag, München, 2010. 18.

⁴ <https://www.chbeck.de/verlag/über-uns/> (30.05.2022).

The juris GmbH was founded in 1985 by the federation (“dem Bund” as opposed to the German states which in their entirety form the Föderation). In contrast zu Beck – a fact which can not be stressed enough in this context – juris started from the first as a legal database. With its creation the federation’s aim was it to supply a modern and extensive legal information system, which should serve the needs of German legal institutions, namely state authorities, courts and universities. In 2001 decided the federation to partially privatize juris, to allow the GmbH to develop further into a business enterprise and as of today into one of the leading providers of digital legal information in the German legal information market. juris itself founded the jurisAllianz, in which it gives a structure for many of German legal publishing houses to work, thrive and supply digital access to their products. Today it offers access to a wide range of products – for legal professionals these would be still the German and the EU-Law, court decisions and legal literature, like legal journals.⁵ But juris has in addition developed its own publishing side: it publishes books in print, especially the so called jurisPraxisKommentare but also code of law books – on the one hand a very interesting move for a comparatively younger company that one could look at as a digital native, on the other hand only the logical consequence of the user-demand for digital products that can be published in print on demand.

This very limited overview over available legal databases shows that expensive content created by the manufacturers of the database stands on equal terms with the free content consisting especially in legislative texts but also for example in the texts of court decisions.

Protection of databases by the Copyright Act

Beforehand: not legally protectable are structures and classification systems on which the database is based. The reason why these elements at the heart of the database are not included in the protection given by the Copyright Act is that the protection of this basis elements would lead to a monopolisation – no one else would be able to design another database guided by the same structures and classification system.⁶

German copyright law differentiates between the legal database as ancillary copyright (Leistungsschutzrecht) and the database as copyright work (Datenbankwerk). The term database is a subset of the term anthology/collection (Sammelwerke) and the legal term database is defined in section 4 I 1 and in section 87a I 1 Copyright Act:

Section 4

Collections and database works

(1) Collections of works, data or other independent elements which by reason of the selection or arrangement of the elements constitute the author’s own intellectual creation (anthology) are protected as independent works irrespective of an existing copyright or ancillary copyright in one of the individual elements.

⁵ <https://www.juris.de/jportal/nav/index.jsp/> (30.05.2022).

⁶ <https://www.uni-bremen.de/urheberrecht/wissensplattform/9-schutz-von-datenbanken> (30.05.2022).

(2) For the purposes of this act, database work is a collection whose elements are arranged systematically or methodically and the individual elements of which are individually accessible by electronic or other means. A computer program (section 69a) used in the creation of the database work or to offer access to its elements does not constitute an integral part of the database work.

Section 87a

Definitions

(1) For the purposes of this act, database is a collection of works, data or other independent elements arranged in a systematic or methodical way and individually accessible by electronic or other means and whose obtaining, verification or presentation requires a substantial qualitative or quantitative investment. A database whose content has been changed in a qualitatively or quantitatively substantial manner is deemed to be a new database insofar as the change requires a substantial qualitative or quantitative investment.

(2) For the purposes of this act, producer of a database is whoever has made the investment within the meaning of subsection (1).

As one can see: the definition of the database does not change, but the legal qualification shows distinctive differences. The twofold protection of the database in the Copyright Act is the result of the transformation of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996⁷ on the legal protection of databases into German law which has led to the additional regulations of sections 87a ff in the Copyright Act.⁸

Database as copyright work

A database which qualifies as a copyright work enjoys the full protection of the Copyright Act. To be deemed a copyright work the database has to fulfill the qualifying conditions according to section 4 in connection with section 2 Copyright Act. First and foremost the database has to be a personal, intellectual creation (“persönliche, geistige Schöpfung”) according to section 2 I, II Copyright Act. The database falls in the category of literary works (section 2 I no 1 Copyright Act). The law does not require the database to fulfill high prerequisites to be deemed a “creation” (section 2 II Copyright Act). It is enough that

⁷ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996. Official Journal of the European Communities L 77/20 of 27.3.96. An assessment of the directive offers: LEISTNER, Matthias: „Last exit” withdrawal? Die Zukunft des Europäischen Datenbankschutzes nach der EuGH-Entscheidung in Sachen BHB v. Hill und dem Evaluierungsbericht der Kommission. *Kommunikation & Recht*, 9 (2007) 457–465; in detail: LEISTNER, Matthias: *Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht. Eine Untersuchung zur Richtlinie 96/9/EG und zu ihrer Umsetzung in das deutsche Urheberrechtsgesetz*. Beck, München, 2000.; WIEBE, Andreas: Der Schutz von Datenbanken – ungeliebtes Stiefkind des Immaterialgüterrecht. Eine Zwischenbilanz sechzehn Jahre nach Einführung der §§ 87a ff. UrhG. *Computer und Recht*, 30 (2014) 1.

⁸ KINDLER, Peter: Leistungsschutz für Datenbanken ohne Werkcharakter – Eine Zwischenbilanz. *Kommunikation & Recht*, 6 (2000) 265–266.

the database shows individual character – die legal term of the so called »Kleine Münze« is to be noted. As a rule, online-databases are to be classified as copyright work, based on the creative possibilities they offer to access and research their content.⁹ Astonishingly is that the extent of work, effort and expert knowledge are not taken into consideration for the assessment of the protectability of the database as copyright work.¹⁰ But on second glance the aforementioned aspects will be important for the question if the database is protected in the form of an ancillary copyright and provide thereby important criteria to distinguish between a database as copyright work or as ancillary copyright.¹¹

As this classification as copyright work applies to the database, the copyright of the database belongs to the creator as defined in section 7 Copyright Act: Creator of the database is the person, who decides the chosen materials and the structure or composition of the database elements. Therefore only humans – not legal entities or the state – can be the creator. The companies behind legal online-databases in Germany therefore exercise the rights over the database not as creators. But as the creation of the database mostly is part of an employment relationship or a service contract, the rights concerning the use of the database belong as a rule to the employer of the creator (section 43).¹²

Ancillary copyright for the database producer

Not only the creator but also the producer of the database is protected by the Copyright Act. The producer owns the rights of an ancillary copyright.

Section 87b

Rights of producer of database

(1) The producer of the database has the exclusive right to reproduce and distribute the database as a whole or a qualitatively or quantitatively substantial part of the database and to make it available to the public. (...)

⁹ MILBRADT, Claudia: Urheberrechtsschutz von Datenbanken. Im Spannungsverhältnis zwischen Informationsfreiheit und Schutz des Datenbankherstellers. *Computer und Recht*, 10 (2002) 710–711.

¹⁰ WELLER, Michael: Voraussetzungen für den Schutz von Datenbanken. Anmerkung zu EuGH 3. Kammer, Urteil vom 01.03.2012 – C-604/10 *juris Praxisreport IT-Recht* 14 (2012) Anm. 3.

¹¹ Representative for the question if the „know-how“ of the database producer might also find legal protection: GÖRÖG, Márta: Das geschützte Wissen und seine rechtliche Absicherung im Hinblick auf den Entwurf eines Vorschlags für neue Regeln für den Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb, sowie rechtswidriger Nutzung und Offenlegung. <https://dfk-online.sze.hu/images/egyedi/lenkovics%20kötet/görög.pdf> (2022.05.30); GÖRÖG, Márta: Know-How-Schutz im nationalen Recht und im Europarecht. *JurPC Web-Dok* 51 (2014). Abs. 42 <https://www.jurpc.de/jurpc/show?id=20140051> (30.05.2022).

¹² WIEMANN, Esther Maria: *Der Arbeitnehmerurheber in Deutschland und Australien* (Schriften zum deutschen, europäischen und internationalen Recht des Geistigen Eigentums und des Wettbewerbs Bd 27) JWV Jenaer Wissenschaftliche Verlagsgesellschaft, Jena. 2020; KOTTHOFF, Jost: § 43 *Urheber in Arbeits- oder Dienstverhältnissen*. In: Dreyer, Gunda et alia (eds): *Urheberrecht*. C.F. Müller, Heidelberg. 4. Aufl. 2018. point 12.

Thereby the manufacturer is the institution, that started the initiative to produce the database, it is the institution, that manages the risk of the production as well as it manages the costs and the use of the used technical, financial and human resources.¹³ As a rule with legal databases the producer does not only handle this aspects in the production phase of the database's formation but also in the ongoing production with its demands of advancement, checking and presenting its contents.¹⁴ The reason producers of databases are protected by the copyright act therefore lies in the great financial risks they undertake to offer the framework in the form of a database to guarantee the data researchability and data availability for the users.¹⁵ But of course as this is an ancillary copyright this protection goes not so far as that of the creator and the creators protected position is independent of the position of the database manufacturer (section 87b Copyright Act).

As both legal positions – that of creator and that of producer – can be obtained via different legal preconditions of the Copyright Act both positions are not exclusive but exist side by side.¹⁶ As long as the database is qualified as a copyright work the producer of the database can hold the rights of producer as well as the rights of the creator, if the creator is his employee.

Use of the legal database

Principally the access and the use of the aforementioned legal databases is not freely available to every interested person and furthermore it is not free of charge. Therefore the legal regulations concerning the access and the use of databases in the Copyright Act are in the context of this study not relevant. The legal databases regulate the access to their content via licences (section 31 Copyright Act), which can be acquired by contract. There is a wide spectrum of possible contracts – ranging for the licenses for state authorities, the licence for the library of an university, the licence for large law firms and the licence as starter package for students. The quantity of the users need for information provided by the database decides to what extend the user requires access to the databases' content: the more information he needs the larger the licence he will require.

And at this point the conflict between the two aims – the free access to legal information as a whole and the need of the legal professional to get precisely and completely the information he is looking for – converges. The producer of the database has to ensure that the content of the legal database contains information as complete as possible but at the same time the producer has to ensure that the contents searchability is guaranteed

¹³ With a vivid example that presents the extent of the infrastructure needed for databases that cope with a great amount of data to offer precise research finds: WIEBE, 2014. 1.

¹⁴ BECKER, Helmut: Juristische Arbeit mit persönlichen Datenbanken (II). *Computer und Recht*, 4 (1989) 339.

¹⁵ EISENMANN, Hartmut – JAUTZ, Ulrich – WECHSLER, Andrea: *Grundriss Gewerblicher Rechtsschutz und Urheberrecht*. C.F.Müller, Heidelberg, 2022. 21 Rn. 49f. and 62 Rn. 173.

¹⁶ <https://www.uni-bremen.de/urheberrecht/wissensplattform/9-schutz-von-datenbanken> (30.05.2022).

so that search requests provide the user exactly with the legislative text, commentary and court decision that answers the users informational need. The compromise between the right to access all available legal information and the important need of the user to find in all the available information exactly that piece of information that the user requires for work purposes, is solved by the providers in two ways: first and as aforementioned they leave the choice to the extent of the access to the database to the user. The user decides if he needs full access to the database or if he requires a customized access with information concerning only the specific field of his field of work. No matter if the user chooses full or customized access in a second step the producer provides a structure in the database as a first step to look systematically for information and in addition the producer provides search instruments which allow the user to even further narrow or widen the approach in the systematically search for information. Here the legal databases show that they are willing to undertake responsibility as important instruments in the state under the rule of law: a legal database can not exclude information from its content solely because the information is not deemed profitable or simply because the information is available elsewhere. The already high and still growing amount of available legal information forces legal databases to grow steadily. New technical possibilities and new user behaviour forces them to evolve permanently.

In addition there is a further challenge which influences the possibilities of free access to legal information: The protection of the database and the protection of the content behind the so called paywall have to be very well developed. This originates from the need of the producer to protect the database and its content against all sorts of cybercrime and data losses through technical accidents.

Furthermore the question into which of the two above mentioned copyright categories a database falls has to be distinguished from the question of the copyright protection of the single elements that form the content of the database. The copyright protection of the database and the copyright protection of the single element are independent of each other. The user of a legal database – no matter under which of the above mentioned categories of the Copyright Act the database falls – is allowed to use copyright protected elements behind the paywall as long as the producer has the right to provide them and the user acquired a licence from the database manufacturer.

The user is also allowed – again no matter with which database is used – to use all elements that are not protected for free. That is why many databases allow users to make a research and to see a “sneak peak” of what results this research might issue, but they establish the paywall in front of the more precious content of the database. So for example a research after section 97 Copyright Act in beck-online or juris might result in the effective legislative text of section 97 Copyright Act in full, but the enhanced connections with further in the database available information concerning the dataset, like past or oncoming amendments of the section, would not be accessible unless the user holds a corresponding licence. Likewise only visible but not accessible via a free research result list would be as a rule copyright protected material like commentaries, essays in

legal journals and collections of forms (Formularsammlungen), which are published or acquired in accordance with the Copyright Act by the database producer.

In the inventory of legal databases legislative texts play an important role. They present an element the user could access even for free without the database but nevertheless they are included in the database. One reason for this is that legislative texts are a major and important part of the database as those texts are the foundation to the understanding for every other law text. Another reason they will always be included in legal databases is the user experience: no database producer wants a dissatisfied user who has to switch databases to look at two equally important texts – for example the legislative text and the corresponding commentary – for his work in two different databases. And the most important reason is that all legal databases strive to provide not only access to their content but further features to simplify, refine and enhance the users work with the database's content. A major part of the effort to provide an enhanced work place for the legal professional in the database is the possibility to connect content through links that further the accessibility of content elements that are only together provide a complete picture for the user that enables the legal professional to understanding and solve legal problems.

Outlook – expected future developments

Open data

Currently the federation is planning to change the existent structures concerning the access to legal information focussing on legislative texts and court decisions. This change is part of the new federal government's Open Governance Policy.¹⁷ This includes the future formation of a new online-portal which shall be offering access to legal information, which will be limited to anonymized, machine-readable and free-of-charge elements consisting solely of court decisions and legislative texts. The ministry of Justice will be the responsible ministry for this online-portal. Until now the federation already offers a free of charge presentation of its laws, court decisions and administrative regulation: *Gesetze-im-Internet*, *Rechtsprechung-im-Internet* und *Verwaltungsvorschriften-im-Internet*. The new federal online-plattform shall unify this three presentations and shall up-date them with new and more metadata to achieve a better searchability. This new online-portal offers thereby Open Data. The *juris GmbH*, which presently is the backbone of the legal information system of the federation, shall further allocate in this new context research services. This online-portal shall be furthermore a means to strengthen the position of the federal documentation centers – located for example at the superior courts – and to allow a stronger participation of the inhabitants of Germany in their entirety via the federal access-plattform for legal information. This federal project is one of the requirements that will make the implementation of the „Rechtsanspruch auf Open Data“ possible – thereby it is political important because this implementation is a part of the coalition agreement of the current Government. Legally this aim of the Government has its basis

¹⁷ https://www.bmj.de/DE/Ministerium/Transparenz/Rechtsinformationsportal/Rechtsinformationsportal_node.html (30.05.2022).

in the *Datennutzungsgesetz*. Furthermore this project is part of the further development towards more electronic services that shall be in the future provided by state authorities and towards the planned digitalisation of the public authorities. It is also considered as one step towards the digitalisation of the legislative procedure, which its parts consisting first of the digital legislative procedure itself and secondly of the digital promulgation of new laws.¹⁸

As the federation plans to develop this open-data online-portal into a database that aims for completeness and simple searchabilities, it might be, that the intended database might not fulfill the term “personal intellectual creation” in its early stages. Furthermore the federation intends to keep its legal information portal as an open-data offer for its citizenz – thereby renouncing parts of the protection the Copyright Act is offering the provider of a database.

Future developments

There are three new technical possibilities that will play a large part in the future of legal work and thereby influence what legal databases will have to offer their users.¹⁹ The times, when a lawyer opened the database and was content when he could researched the content of the legal database for court decisions etc. are over. The legal professional expects that the huge amount of information available is not only structured and prefiltered for him by the database, but he expects an easy and technically/digitally integration in his or her work tools and workflow. Legal Analytics, Predictive Analytics und Prescriptive Analytics are perceived as the digital future.

To start with the most advanced concept, which is technically a long term project, when it should come to its implementation, let's beginn with Prescriptive Analytics shall be able to technically develop proposals for the legal user, by which arguments and procedure strategie he will be able to achieve a given goal, for example to win in court. In this phase the database will be able to recommend to the lawyer arguments and argumentation strategies for the lawyers specific case. Then it rests solely on the lawyer to evaluate and put the material together.

But also Predictive Analytics goes already way beyond that, what an old-fashioned database has offered as functions. Predictive Analytics is the databased effort to predict out of the existing data the result of future events, for example court decisions.

Last but not least Legal Analytics describes a process that automatically analyses data after useful information – the example given by Wolters Kluwer is the data based evaluation which courts in Germany very often deal with a topic the user in question is very often concerned with, let's say as an example ebook-licencing. Legal Analytics shall enable the database to search for similiar content and offer its results user-specific.

¹⁸ Id (30.05.2022).

¹⁹ KLOSTERMANN, Johannes – HARTZ, Christian: *Die Zukunft der juristischen Datenbankrecherche*. <https://www.wolterskluwer.com/de-de/expert-insights/die-zukunft-der-juristischen-datenbankrecherche> (30.05.2022).

Additionally to the just outlined thoughts there are many further recent considerations for which the following shall be only one example: legal databases may support the implementation of legal principles by means of new functionalities. One of these legal principles, that could be advanced in this way, is the principle of just sentencing – the same criminal act should be punished with the same sentencing no matter in which court's competence the sentencing falls. As judges are human and there is no national data collection in which judges could form an opinion about the severity of penalties they impose in comparison to other judges, it is not to be avoided that courts differ moderately in the severity of the penalties for equivalent criminal acts. The example of foreign solutions like the Commonwealth Sentencing Database, which offers statistical information on sentences by courts for federal offences²⁰, is discussed as a future possibility to further a more harmonized sentencing of criminal acts by German courts while simultaneously avoiding any interference with the independence of the judge and the judiciary.²¹

Conclusion

Producers of legal databases are called upon by the aforementioned expected future developments to provide the growing amount of legal data in a way that forms the best user experience for the legal professional. To supply answers for all those different and diverse needs the database producer has to constantly and sharply observe the developments in legal education and profession to be able to react to this with specialist offers to all groups of potential users. This encourages the producers to enhance the database to a level at which it is protected as a copyright work and at the same point it encourages them to make major investments into the database. Thereby strengthening exactly those characteristics of the database that ensures its protectability according to the two different options regulated in sections 4, 2 and 87a ff. of the Copyright Act.

With the growing amount of available legal information the user of the database is likewise challenged to rethink the user patterns with which legal professionals work when they are using legal databases. It is no longer possible to get satisfying results by using legal databases as one would use google or a digital legal general commentary. The maximum benefit of the use of a legal database is not only achieved by a big research result but in most cases it is achieved by a most precise research result that relieves the user of a time consuming own evaluation of the result list. Also the planned federal database – as its declared goal is to achieve completeness regarding legislative texts and court decisions while being a free of charge offer – will have to handle the conflict between its strive for completeness and its strive to provide specific research results to its users.

Modern, already established legal databases offer a lot of possibilities to personalize their research options to get customized research results, but that simultaneously challenges the user to take the time to learn about these options and to make the

²⁰ <https://csd.njca.com.au/> (30.05.2022).

²¹ <https://www.libra-rechtsbriefing.de/L/gerechter-strafen-mit-ki/> (30.05.2022).

necessary modifications in the user interface²². This are rewarding efforts – especially as legal databases strive to meet the needs of the legal professional by providing more and stronger possibilities to integrate the content of the database in the legal professionals other digital work instruments, be it the phone or the desktop.

²² ZUNKER, Nora: Finden statt suchen: Juristische Datenbanken. *AnwBl*, (2022) 340.; KRAFT, Matthias: Juristische Online Datenbanken bieten viel – aber nicht alles für jeden. *AnwBl*, (2007) 415–417.

MOLNÁR PÉTER

Az elektronikus ügyintézés tendenciái a közigazgatás helyi szintjén*

Bevezetés

A közigazgatás rezilienciájának vizsgálata különösen fontos napjainkban. Az elmúlt bő két évben a pandémia rámutatott, hogy a közigazgatás szervezetének a közszolgáltatásokhoz való hozzáférést képesnek kell lennie megváltozott, sokszor már-már reménytelennek tűnő helyzetekben is biztosítania. E sajátos küzdelem során alapvető fontossággal bírt a digitális közigazgatás eszköztára, a hivatal, mint a hatósági ügyintézés fizikai helyszíne ugyanis a távoli munkavégzés, vagy egy-egy, alkalmanként az egész hivatalt érintő karantén-kötelezettség okán egyre többször vált elérhetetlenné az ügyfelek számára.

A kihívások különösen a helyi önkormányzatok és az általuk fenntartott önkormányzati hivatalok tekintetében tűnhetnek jelentősnek. Az elaprózódott magyar településszerkezet, a központi koordináció hiányában korlátozottan, de legalábbis szigetszerűen megvalósuló informatikai fejlesztések, valamint az egységes online ügyintézési felületek hiányának tükrében elmondható, hogy az alrendszernek évtizedes hátrányt kellett, hogy leküzdjön a 2010-es évek derekától. A kormányzat felismerve a problémákat, évek óta hangsúlyt fektet a szektor digitalizációs fejlesztésébe, a folyamat egyik (talán legfontosabb) mérföldkövét pedig kétség kívül az önkormányzati ASP-rendszer 2019-es országos kiterjesztése jelentette.

Tanulmányom alapvető kérdése, hogy elegendők voltak-e az elmúlt évek központi törekvései ahhoz, hogy az önkormányzatok sikeresen építsék be az elektronikus ügyintézés gyakorlatát napi működésükbe és ennek segítségével eredményesebben birkózzanak meg a pandémia okozta válság kezelésével helyi szinten.

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Főbb kérdések és hipotézis meghatározása

A kutatást megelőzően több kérdés is megfogalmazásra került. Vajon kellő mértékben biztosított az elektronikus ügyintézés igénybevételi lehetősége a magyarországi önkormányzati igazgatás területén? Amennyiben biztosított, úgy milyen mértékben veszik igénybe ezt az utat az ügyfelek? A 2019-ben jórészt lezárult, az elektronikus ügyintézés célzó fejlesztések valóban elérték-e hatásukat, azaz számszerűen nőtt-e az önkormányzati szervezetrendszerben hatósági eljárások megindítására irányuló elektronikus beadványok száma? Milyen hatást gyakorolt a pandémia az elektronikus út igénybevételére?

A kérdésekkel kapcsolatban felállított főbb hipotézisem a következő: Az elektronikus úton megindított hatósági eljárások száma jelentősen megnőtt a vizsgált időszakban köszönhetően a jogi akadályok elhárulásának és a technológiai fejlesztéseknek. A COVID-19 megjelenése 2020-ban és 2021-ben a növekedést ütemét tovább növelte. Ez utóbbi feltevés esetleges igazolása azért is bír nagy jelentőséggel, mert a növekedés mértéke egyszersmind az új fejlesztések eredményességének egyik fokmérője lehet.

Metodika

A kutatás során a szakirodalom elemzése útján definiáltam az elektronikus ügyintézés és kiválasztottam az elektronikus ügyintézésnek, mint összetett folyamatnak a vizsgálandó mozzanatát. Ezt követően áttekintettem az önkormányzati alrendszerre irányadó előírások változását a hatósági eljárásokra vonatkozó hazai jogszabályok releváns rendelkezéseinek elemzésével.

A vizsgálat szakszerű lefolytatásához legfőképpen mérhető, statisztikai jellegű adatokra volt szükségem. A kutatás kezdetekor nyilvánvalóvá vált az a tény, hogy míg a központi közigazgatás által alkalmazott legnépszerűbb elektronikus ügyintézési felületek (így pl. a Webes ügysegéd) esetében az adatok nyilvánosan hozzáférhetőek¹, ugyanez már nem mondható el az önkormányzati alrendszerrel. Ebből következően az elérhető platformok vonatkozásában kellett releváns adatokat gyűjtenem. Az egyik fő forrásom az ASP-rendszert üzemeltető Magyar Államkincstárral történő adategyeztetést követően elkészített, az ASP e-ügyintézési felületén keresztül indított ügyek számára vonatkozó adatbázis, másik forrásom pedig az általam közel százötven önkormányzat bevonásával végzett primer kérdőíves kutatás volt.

Kérdőívemben elsősorban az elektronikus ügyindítások számát vizsgáltam a pandémia előtti évben (2019), illetve a pandémia alatt (2020-2021). A fentiek szerint képzett adatok rendszerezésével azonosítani tudtam olyan összefüggéseket, amik segítettek előzetesen felállított hipotézisem vizsgálatában.

Az elektronikus ügyintézés meghatározása

Az elektronikus ügyintézés elsősorban az elektronikus, vagy napjainkban egyre inkább digitális jelzővel aposztrofált közigazgatás eszköztárában helyezhetjük el. Az OECD

¹ A Belügyminisztérium Nyilvántartások Vezetéséért Felelős Helyettes Államtitkárságának honlapján közzétett éves monitoring jelentések <https://nyilvantarto.hu/hu/statisztikak?stat=monitoring> (2022.05.26.)

már a 2000-es évek elején definiálta² az elektronikus közigazgatást, mégpedig a következők szerint: az e-közigazgatás az információs és kommunikációs technológiák, valamint részben az internet felhasználása a jobb kormányzás érdekében. A szervezet bő egy évtizeddel később meghatározta a digitális közigazgatás fogalmát is: a digitális technológiák alkalmazása a kormányzati modernizációs stratégiák integráns részeként a közszolgálati értékteremtés céljából.³ A szakirodalom jelenleg nem egységes a tekintetben, hogy a két fogalom szinonimnak tekinthető-e⁴, mindazonáltal fontos felhívni a figyelmet arra, hogy az elektronikus vagy éppen digitális közigazgatásként aposztrofált jelenség jelentéstartalma a technológia fejlődésével időben folyamatosan változik.⁵

Az elektronikus ügyintézés az elektronikus (vagy digitális-) közigazgatás viszonylatában értelmezhető. A nemzetközi szakirodalomban e jelenség kapcsán is számos definícióval találkozhatunk. Egy korai meghatározás szerint az elektronikus ügyintézés a civil kapcsolatmenedzsment egy formája.⁶ Egyes szerzők az elektronikus ügyintézészt a papírmentes iroda, mint ideális állapot elérését célzó eszközrendszernek tekintik. Egy széles körben alkalmazott meghatározás szerint az elektronikus ügyintézés egy olyan mechanizmusra utal, amely a hagyományos, papíralapú irodai folyamatokat elektronikus folyamatokká alakítja, azaz voltaképpen olyan IKT-eszközöket értünk alatta, amelyek célja a különféle szervezetek hatékonyságának és teljesítményének javítása.⁷ Abban az esetben sem vagyunk egyszerű helyzetben, ha jogi definíciót keresünk. Az elektronikus ügyintézés fogalmát jelenleg egyetlen hazai jogszabály sem határozza meg, sőt, az elektronikus ügyintézés és a bizalmi szolgáltatások általános szabályairól szóló 2015. évi CCXXII. törvény indokolása kifejezetten rögzíti, hogy a szakirodalom mindmáig adós egy konszenzusos definícióval. Mindezek ellenére a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény 2016. december 31. napjáig hatályos szövege tartalmazott egy meghatározást: azokat az eljárási cselekményeket sorolta az elektronikus ügyintézés körébe, amelyek során az ügyfél vagy az ügyintézészt biztosító szerv elektronikus nyilatkozatot tesz, vagy az ügyintézészt biztosító szerv az ügyfél vagy más ügyintézészt biztosító szerv nem elektronikus nyilatkozatát elektronikus nyilatkozattá alakítja át és azt az eljárás

² OECD: *The e-Government Imperative*. OECD e-Government Studies, OECD Publications, Paris, France, 2003. 23. DOI: <https://dx.doi.org/10.1787/9789264101197-en>

³ OECD Public Governance and Territorial Development Directorate: *Recommendation of the Council on Digital Government Strategies*, 6.

⁴ Vö. pl. HSINCHUN, Chen et al. (ed.): *Digital Government – E-Government Research, Case studies and Implementation*. Springer, USA. 2008. xvi. vagy CSEH Gergely – PAULOVICs Anita: A közigazgatási bürokrácia digitalizálása. *Infokommunikáció és Jog*, december (2018) 62.

⁵ CSÁKI-HATALOVICS Gyula: Új trendek Európában az elektronikus közigazgatás területén. *Glossa Iuridica Jogi Szakmai Folyóirat*, 4 (2015) 71–103.

⁶ MICHEL, Helen: E-administration, e-Government, e-Governance and the Learning City: a Typology of Citizenship management using ICTs. *The Electronic Journal of e-Government*, Vol. 3 Issue 4. (2005) 213–218.

⁷ KHOROW-POUR, Mehdi (ed.): *Encyclopedia of Information Science and Technology*. IGI Global, Hershey. 2015. 5301.

során felhasználja.⁸ Talán nem tévedünk nagyot, ha közigazgatási tárgyú kutatásaink során az elektronikus ügyintézés lényegét a hatóság és az ügyfél közötti sajátos, papírmentes vagy digitális formában megvalósuló, jellemzően joghatás kiváltására irányuló konkrét interakcióként ragadjuk meg.⁹ Mindazonáltal alá kell húznunk, hogy az elektronikus ügyintézésnek létezik egy másik, a szervezet belső folyamataira koncentráló értelmezése is. Eserint az e-ügyintézés jelöli azt a folyamatot, amikor az egyes szervezeteken belül zajló papíralapú ügyintézés elektronikussá válik.¹⁰

Elektronikus ügyintézés a közigazgatás helyi szintjén

Bevezető gondolataim között röviden már utaltam a magyarországi önkormányzati rendszer sajátos jellegére. A települési önkormányzatok a rendszerváltozás idején alapvetően az előző, szocialista alapokon nyugvó államszervezet általános kritikájának egyenes következményeként¹¹ magas fokú önállósággal rendelkező autonóm entitásokként jöttek létre. Alapvetően jelentőséggel bírt, hogy minden település, függetlenül annak jogállásától (község, város, megyei jogú város vagy főváros) önálló képviselő-testülettel és polgármesterrel rendelkezzen.

Az önkormányzati vezetők közül az önkormányzat hivatalát vezető jegyző vált a rendszer legrendhagyóbb helyzetű képviselőjévé. Míg feladatai egy része az önkormányzat tevékenységével függtek össze (képviseleti döntések előkészítése, végrehajtása, törvényesség biztosítása), általános elsőfokú államigazgatási szervnek minősült, ellátva a szakigazgatási hatáskörök döntő többségét is, függetlenül az általa vezetett hivatal méretétől és technikai felszereltségétől. Az általános elsőfokú államigazgatási hatósági funkcióból következően némileg leegyszerűsítve talán kijelenthető, hogy az 2010-es évekig a polgárok többségének elsőként a jegyzőt, illetve a jegyző által vezetett önkormányzati hivatalt (Körjegyzőséget vagy polgármesteri hivatalt) kellett megkeresnie szinte minden kisebb-nagyobb jelentőségű államigazgatási ügygel kapcsolatos kérelemmel.

A magas szintű autonómia természetesen nem csak előnyökkel, de hátrányokkal is járt az önkormányzatok számára. Központi irányítás hiányában nem valósulhattak meg egységes informatikai fejlesztések a közigazgatás helyi szintjén, így a 2010-es évekig legfeljebb szigetszerű fejlesztésekkel találkozhatunk.

Az digitalizációs fejlesztéseket a jogi környezet sem segítette. A kérelmek elektronikus benyújtásának lehetőségét Magyarország első közigazgatási eljárási törvénye, a rendszerváltozást követően alapos felülvizsgálaton átesett, az államigazgatási eljárás általános szabályairól szóló 1957. évi IV. törvény annak 2001-es módosítását követően tette csak lehetővé. A törvény módosított 16.§-a értelmében a közigazgatási szervhez címzett kérel-

⁸ 2004. évi CXL. törvény 172.§ a) pontja.

⁹ Elsősorban C2G és B2G kapcsolatok.

¹⁰ ZSOM Brigitta: Az elektronikus közigazgatás és a területi kutatások kapcsolatáról. *Tér és Társadalom*, 28. évf. 3. sz. (2014) 21.

¹¹ GAJDUSCHEK György: Változások az önkormányzati rendszerben: Egy értelmezési kísérlet. *Fundamentum*, 2. (2012) 61.

mek benyújtására főszabály szerint továbbra is csak szóban vagy írásban kerülhetett sor, ám jogszabály kivételesen előírhatta, hogy az ügyfél a kérelmét az erre a célra rendszeresített nyomtatványon nyújtsa be. Ilyen jogszabály kiadására mindazonáltal nem került sor.

Az Áe. helyébe lépő, a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény gyökeresen szakított elődje megoldásával. A jogszabály általános jelleggel előírta a kérelmek elektronikus úton történő fogadásának kötelezettségét a közigazgatási szervek számára, ám egyben úgy rendelkezett, hogy más jogszabályok (így önkormányzati rendeletek is) kizárhatják egyes ügyek elektronikus úton történő intézését. Talán jól jelzi a központi irányítás nélkül működő kis önkormányzatok technológiai felkészültségének hiányát, hogy sorra jelentek meg olyan önkormányzati rendeletek, amelyek kizárták az elektronikus út alkalmazásának lehetőségét. Több ezek közül a mai napig megtalálható a Nemzeti Jogszabálytárban

Az elektronikus ügyintézés és a bizalmi szolgáltatások általános szabályairól szóló 2015. évi CCXXII. törvény elsőként tette kötelezővé az elektronikus kapcsolattartást egyes szervezetek (így az államigazgatási szervek vagy a bíróságok mellett a helyi önkormányzatok és szerveik részére) az egymás közötti kommunikációban. Harmadik közigazgatási eljárási törvényünk, az általános közigazgatási rendtartásról szóló 2016. évi CL. törvény pedig az írásbeli kapcsolattartási formák között nevesíti a szabályozott elektronikus utat. Ez utóbbi két jogszabály együttes alkalmazása kizárja azt, hogy az önkormányzatok mentesüljenek kérelmek elektronikus fogadásának kötelezettsége alól.

A technológiai háttér

Az elektronikus ügyintézési felületek a központi közigazgatásban már évekkel ezelőtt kialakultak. Fontos mindazonáltal érzékelnünk, hogy még napjainkban sem beszélhetünk egyetlen, egységes felületről. Az elmúlt néhány évben kétségkívül legtöbbször igénybe vett rendszere a Webes Ügysegéd, de emellett a Nemzeti Adó- és Vámhivatal is rendelkezik saját alkalmazással, nem is beszélve az XR rendszerről vagy az Okmányappról.

Az ePapír a Webes ügysegédnél sokoldalúbb szolgáltatás. Alapvető célja, hogy azok számára is lehetővé tegye az elektronikus ügyintézés, akiknek kevesebb rutinjuk van az informatikai eszközök és alkalmazások használatában.¹² Az ePapír formanyomtatványok helyett szabadszöveges beadványok benyújtását vagy digitalizált, eredetileg papír alapú dokumentumok hitelesített módon történő benyújtását teszi lehetővé. Nagyon fontos, hogy az ePapír nem csak a központi és területi államigazgatási szerveknél történő ügyintézés során alkalmazható. A szolgáltatás révén bármely közigazgatási szervvel felvehető a kapcsolat, így az önkormányzatokkal vagy az önkormányzati hivatalokkal is.

Az önkormányzatok 2019-ig nem rendelkeztek a Webes ügysegédhez hasonló, standardizált ügyintézési felülettel. 2019-re sor került az önkormányzati ASP országos kiterjesztésére, amely az e-ügyintézés terén is számos új lehetőséget teremtett. Az önkor-

¹² NISZ közlemény: Új időszámítás az e-ügyintézésben – 2017.12.20. <https://www.nisz.hu/hu/aktualis/%C3%BAj-id%C5%91sz%C3%A1m%C3%ADt%C3%A1s-az-e-%C3%BCgyint%C3%A9z%C3%A9s-ben> (2022.05.16.)

mányzati ASP kötelező alkalmazásához a törvényi alapot a Magyarország helyi önkormányzatairól szóló 2011. évi CLXXXIX. törvény módosításáról szóló 2016. évi LIV. törvény teremtette meg.¹³ Az ASP-projekt eredményeként létrejött egy önkormányzati szinten központilag egységes webportál, amely kifejezetten az önkormányzati elektronikus ügyintézés támogatja. Az Önkormányzati Hivatali Portál¹⁴ (OHP) az önkormányzati ASP-rendszerben az elektronikus önkormányzati ügyintézés helyszíne. A portál az önkormányzati ASP-rendszert igénybe vevő önkormányzatok természetes személy és jogi személy ügyfelei számára egyaránt lehetőséget biztosít a szakrendszeri alkalmazásokhoz kialakított, elektronikusan elérhető szolgáltatások igénybevételére, különböző űrlapok kitöltésére.

E ponton hangsúlyozni kell, hogy az ASP nem csak szoftveres segítséget jelentett, hanem a bevezetés során az önkormányzatok a hivatali számítógépes infrastruktúra fejlesztésére fordítható támogatáshoz is jutottak egy pályázati konstrukció keretében.

A pandémia hatása az elektronikusan ügyintézésre

Az elektronikus ügyintézés legkifejezőbb mutatószámaként az egyes ügyintézési platformokon indított ügyeket határoztam meg. Ezek írják le leginkább a C2G és B2G kapcsolatokat, lévén segítségükkel lehet következtetni arra, hogy az ügyfelek ténylegesen hány alkalommal fordultak vagy kíséreltek meg fordulni elektronikus kérelemmel a hatóságokhoz.

Mint fentebb már utaltam rá, alapvetően három évet vizsgáltam. 2019-ben épült ki országosan az önkormányzati ASP rendszer, amelynek e célra létrehozott modulja lehetővé tette, hogy az önkormányzatok a hatáskörükbe tartozó ügyek vonatkozásában kérelem-űrlapokat készítsenek és tegyenek nyilvánosan elérhetővé. 2020-ban, a pandémia megjelenésével kerültek kiadásra a távolságtartásra vonatkozó rendelkezések (maszkhasználat, kijárási korlátozás egyes napszakokban, kötelező karantén előírása igazolt megbetegedettekkel történő érintkezést követően, stb.). 2021-ben az intézkedések többsége fennmaradt, sőt a 104/2021. (III.5.) Korm. rendelet egy rövidebb időtartamra elrendelte a távoli munkavégzés főszabályként történő alkalmazását a közigazgatásban.

A három év számszaki adatainak vizsgálatához elsősorban számszerűsíthető adatokra volt szükségem.

Bonyolította a kérdést, hogy egyes rendszerek vonatkozásában csak részlegesen álltak rendelkezésre a vizsgálatok elkészítéséhez szükséges statisztikai adatok. Egyes központi felületek, mint a Webes Ügysegéd tekintetében a BM 2016-tól részletes, éves monitoring jelentéseket tesz közzé, amelyek az ügyfélkapu regisztrációk változásának ütemével együtt segítenek megítélni a központi közigazgatásban az elektronikus ügyintézés választó ügyfelek számának változásait.

¹³ https://joallamjelentes.uni-nke.hu/SpecJelentesek/SPECJEL2018_Az%20elektronikus%20%C3%BCgyint%C3%A9z%C3%A9s%20helyzete_kk_d%C3%A1_0307.pdf (2022.05.16.)

¹⁴ Újabbban: E-önkormányzat Portál.

A jelentések szerint a Webes Ügysegéden keresztül történő ügyindítások száma 2020-ban kisebb mértékben (1 509 109-ről 1 544 368-ra), míg 2021-ben jelentős mértékben (2 131 065) növekedett.

Az ügyeiket az ASP OHP felületén keresztül intéző ügyfelek számáról nem állnak rendelkezésre nyilvános adatok. A kutatás keretében az ASP-rendszert üzemeltető Magyar Államkincstárt kerestem meg az adatok beszerzése érdekében. A Magyar Államkincstár nyilvántartásai szerint az ASP OHP felületén keresztül ügyet indító ügyfelek száma 2020-ban a 2019-es szinthez képest nagymértékben, 336 008-ról 700 792-re) nőtt. 2021-re ez a lendület alábbhagyott, és bár az ASP-n keresztül indított ügyek száma nem esett vissza a 2019-es szintre, 518 695-re csökkent.

Egy felmérés tapasztalatai

Ahogy az fentebb láthattuk, az ASP OHP csak egyik formája a rendelkezésre álló, elektronikus ügyindítást lehetővé tevő rendszereknek. Ennek megfelelően az önkormányzatok számára is nyitva álló egyéb szolgáltatás (így különösen: az ePapír igénybevételével történő) segítségével indított ügyekről – nyilvántartás hiányában – csak akkor kaphatunk konkrét képet, ha közvetlenül az önkormányzatokhoz fordulunk adatokért. Kérdőívemmel több mint 2000 önkormányzatot sikerült elérnem, melyek közül értékelhető választ 148-tól kaptam (ez megközelíti az 5%-os országos arányt). A válaszadók közül 125 önkormányzat község, 19 város, 3 megyei jogú város, egy pedig fővárosi kerület státusszal bír. Az önkormányzatok megoszlása közelít a településtípusok országos megoszlásához (2809 község, 322 város, 23 megyei jogú város, 23 fővárosi kerület). Tekintettel arra, hogy valamennyi statisztikai régióból érkeztek válaszok, a kérdőíves felmérés reprezentatívnak tekinthető. Fontos, hogy a torzítások kiküszöbölése érdekében a közös önkormányzati hivatal fenntartó önkormányzatok esetében a jegyzői hatáskörbe tartozó államigazgatási ügyekkel kapcsolatban azt kértem, hogy azokat az illetékességet megalapozó településhez igazodóan adják meg a válaszadók.

Az első kérdés arra irányult, hogy az önkormányzatok milyen mértékű változást érzektek az elektronikusan benyújtott kérelmek számában 2020-ban a megelőző évhez képest. A legtöbb önkormányzat e tekintetben 1-25%-os növekedést tapasztalt, és mindössze 43 önkormányzat nyilatkozott úgy, hogy nem változott az elektronikusan beérkezett kérelmek száma. 51% feletti növekedésről hét önkormányzat számolt be. Ezek közül hat önkormányzat városi, egy pedig községi jogállással bírt. Mindössze egyetlen községi önkormányzat nyilatkozott úgy, hogy csökkent az elektronikus úton benyújtott kérelmek száma, méghozzá 51-75%-os mértékben.

A 2021-es évben az ASP-n keresztül benyújtott kérelmek száma arra engedne következtetni, hogy a lendület alábbhagyott, kevesebb elektronikus kérelem benyújtására került sor. A felmérés adatai mindazonáltal ennek ellentmondanak. A megelőző évhez hasonlóan 43 önkormányzat nem tapasztalt számbeli változást. A változást tapasztalók közül mindazonáltal immár 14 település jelezte, hogy illetékességi területén 51-75%-os növekedés történt. Egyetlen önkormányzat sem nyilatkozott úgy, hogy az elektronikus

úton beérkező kérelmek száma érdemben csökkent volna, ellenben már 16 önkormányzat tájékoztatót arról, hogy a növekedés 51%-ot meghaladó volt, ebből pedig 10 községi önkormányzat státuszú.

Megállapítások és következtetések

A kutatást megelőzően felállított hipotézisem a fenti vizsgálatok alapján részben igazolásra került, mivel mind az ASP-OHP felületen benyújtott kérelmek száma, mind pedig az önkormányzatok által visszaküldött kérdőívek a 2019-es évnél magasabb ügyindítási számról számoltak be 2020-ban, és a 2020-as évnél magasabbról 2021-ben. Fontos érzékelnünk, hogy noha az önkormányzati ASP rendszer e-Önkormányzat Portálján keresztül történő kérelembenyújtás 2021-ben némileg csökkent az előző évhez képest, az önkormányzatok továbbra is növekedést érzékeltek. Ennek hátterében az ASP-nél egyszerűbben kezelhető ePapír szolgáltatás népszerűségének növekedése állhat. Az önkormányzatokhoz és hivatalihoz ePapíron keresztül benyújtott kérelmek számáról mindazonáltal nem rendelkezem adattal, így a tényleges számok ismeretének hiányában a központi közigazgatással történő összehasonlítás nem kivitelezhető.

Problémafelvetések és további kutatási lehetőségek

A kutatás során alapvető problémát jelentett az elektronikus ügyintézésre vonatkozó adatok nyilvánosságának hiánya. Amennyiben a vonatkozó adatok nem kerülnek nyilvánosságra hozatalra, a kutatói munka is elnehezül. Annyi mindenképpen megállapítható, hogy az ASP e-Önkormányzat Portált a lakosság elenyésző százaléka használja. Ennek tükrében felmerül a kérdés, hogy sikeresnek nevezhető-e a szolgáltatás fejlesztése, mivel a kutatás során feltárt adatok alapján a rendszer a jelentős szakmai és anyagi ráfordítások ellenére sem nem feltétlenül váltotta be a hozzá fűzött reményeket.

Az írásomban ismertetett kutatási eredmények mellett érdemes lehet az elektronikus ügyintézés kérdését a felhasználók, azaz az ügyfelek szempontjából is megvizsgálni. Milyen elektronikus ügyintézési rendszereket és miért preferálnak? Milyen fejlesztésekre lenne szükség ahhoz, hogy nagyobb arányban vegyék igénybe az ASP e-Önkormányzat Portált? E kérdésekre csak további kutatások adhatnak megnyugtató választ.

PÉTER MOLNÁR

Tendencies in electronic administration at the
local level of public administration

(Summary)

In my paper, I examine the impact of the pandemic on e-government at the local level of the Hungarian public administration. My research shows that COVID-19 had a positive impact on the uptake of e-administration tools, but that the centrally developed e-government platform for local governments did not necessarily live up to expectations.

In addition to the analysis of national and international literature, I also used the results of a primary research I conducted.

PINTÉR MELINDA

Elektronikus szavazás Magyarországon: Miért nincs, ha lehetne?

Bevezetés

A digitális állam, valamint az elektronikus kormányzás gyakorlati megvalósításának fontos alkotóeleme az elektronikus demokrácia, ezen belül pedig az elektronikus szavazás¹. Noha számos külföldi példa és jó gyakorlat látható már az alkalmazására, az IDEA Institute (Institute for Democracy and Electoral Assistance) adatai szerint jelenleg a világon 34 ország használ valamilyen formában elektronikus szavazást.² Nem hivatalos formában 2021-ben az ellenzéki oldal előválasztási folyamatában Magyarországon is megvalósult – amely során mind az előnyei, mind pedig a hátrányai nagyon jól láthatóak voltak –, hazánkban az elektronikus, online szavazás „élesben”, azaz országgyűlési, helyi önkormányzati, európai parlamenti választások vagy éppen népszavazás során eddig még nem került bevezetésre.

Az állami szinten is minél nagyobb mértékben, illetve minden területre kiterjedően megvalósuló digitalizáció, ennek keretében pedig például az elektronikus szavazás alkalmazása nemcsak európai szinten támogatott, de gyakorlati szempontból is kézenfekvőnek tűnik a rendelkezésre álló technikai és technológiai lehetőségek minél szélesebb körű kiaknázása annak érdekében, hogy ezáltal olyan folyamatok legyen még gyorsabbak és egyszerűbbek, mint például a szavazás. Az Európa Tanács például általános szabványok megfogalmazásával is segíti az elektronikus szavazási rendszerek elterjedését.³ Mindez adott esetben nemcsak a választói aktivitást növelheti, hanem egyszerű „menekülési utat” biztosíthat olyan helyzetekben is, amikor a személyes részvétel akadályokba ütközik vagy ellehetetlenül: legyen az egy, a szabad mozgást korlátozó vagy ellehetetlenítő világjárvány,

¹ MAHRER, Harald – KRIMMER, Robert: Towards the enhancement of e-democracy: identifying the notion of the ‘middleman paradox’. *Information Systems Journal*, Vol. 15 No. 1 (2005) 30.

² <https://www.idea.int/data-tools/question-view/742> (2022.05.31.)

³ CM/Rec (2017)5. sz. ajánlás, <https://rm.coe.int/0900001680726f6f> (2022.05.31.)

vagy a külföldön élő állampolgárok képviselőkre történő személyes eljuttatásában felmerülő nehézségek és magas időbeni vagy anyagi költségek. Ennek ellenére a gyakorlatban mégsem került még alkalmazásra az elektronikus szavazás Magyarországon, és indokolt lehet látni, vajon miért van ez.

Számos ok magyarázhatja azt, hogy a jogalkotó miért nem döntött még az elektronikus szavazás bevezetéséről Magyarországon. Jelen dolgozat keretében nincs lehetőség arra, hogy a teljesség igényével, minden részletre kiterjedően kerüljön tanulmányozásra a kérdés; ezért a dolgozat vizsgálati fókusz a legfontosabbnak tekintett aspektusokra irányul, amelyek az állam, az állam digitális környezete, illetve az elektronikus szavazás vizsgálatának a metszéspontjában talán a legfontosabbak: az elektronikus szavazás előnyeinek és hátrányainak és az elektronikus szavazás ellen és mellett szóló érveknek bemutatására, valamint az elektronikus szavazás gyakorlati megvalósításának lehetőségeinek és akadályainak az áttekintésére. Végül pedig a dolgozat megkísérel válaszolni arra a kérdésre, hogy mi lehet az oka annak, hogy szemben számos más országgal, hazánkban még mindig nem opció az elektronikus szavazás.

Érdeemes egyértelművé tenni, hogy ennek a dolgozatnak a keretében mit kell érteni az elektronikus szavazás gyűjtőfogalom alatt. Itt és most az internetes szavazást, azaz azokat az online formában megvalósuló szavazási folyamatokat értjük elektronikus szavazás alatt, amelyek infokommunikációs technológiák használatával teszik vagy tennék lehetővé a szavazást.⁴ Azaz, amikor internet-hozzáféréssel számítógépen, vagy akár okostelefonon le tudja adni a választásra jogosult állampolgár a szavazatát, nem szükséges a szavazáshoz fizikailag megjelennie a szavazóhelyiségben a választás napján, elég, ha online van jelen. Azért fontos a dolgozat ehhez a fogalomhoz kapcsolódó értelmezési keretének konkretizálása, mert az elektronikus szavazás hagyományosan egy elég tág gyűjtőfogalom, ami praktikusán magába foglal olyan gyakorlatokat is, mint például az elektronikus szavazógépekkel való szavazás,⁵ amikor a szavazás fizikai helyszínén nem papíron, hanem egy gép segítségével tudja leadni szavazatát a választópolgár. Ugyanakkor jelen dolgozat az elektronikus szavazás kifejezés alatt kizárólag az online megvalósuló szavazatleadást érti.

Az elektronikus szavazás előnyei és hátrányai

A szakirodalom részletesen foglalkozik azzal, hogy milyen előnyei és hátrányai vannak vagy lehetnek az elektronikus szavazás bevezetésének. A téma vizsgálatához és a dolgozat fő kérdésének megválaszolásához mindenképpen érdemes röviden áttekinteni ezeket a főbb meglátásokat.

⁴ CSERNY Ákos – NEMESLAKI András: *Az e-szavazás lehetőségei és korlátai Magyarországon: Kutatási irányok és fejlesztési javaslatok az e-demokrácia kiterjesztésére*. In: Cserny Ákos (szerk.): *Választási dilemmák: Tanulmányok az új választási eljárási törvény novumai és első megmértetése tárgyában*. Nemzeti Köszolgálati Egyetem, Budapest, 2015. 238.

⁵ HALLÓK Tamás: *Szavazás elektronikus szavazógépekkel. Sectio Juridica et Politica Miskolc*, Tomus XXIX/1. (2011) 191.

Az elektronikus szavazás előnyei

A vonatkozó szakirodalom alapján elmondható, hogy az elektronikus szavazás gyakorlati alkalmazásának legnagyobb előnyei között szerepel az elektronikus szavazás demokráciáérzetet növelő és a választásba vetett bizalmat építő jellege, valamint a választási folyamat általánosságban vett hatékonyságának növelésére irányuló volta. Az elektronikus szavazás ugyanis kiküszöbölheti a választási csalások bizonyos formáit, felgyorsíthatja az eredmények feldolgozását, és szélesebb körben elérhetővé és kényelmesebbé teheti az állampolgárok számára a szavazást.⁶

Az elektronikus szavazás ráadásul gyorsabb és olcsóbb,⁷ mint az analóg, offline formában megrendezett változata, emellett a szavazás lebonyolítása is rugalmasabb lehet.⁸ Noha a kutatási eredmények eltérő képet mutatnak arra vonatkozóan, hogy az elektronikus szavazás vajon általánosan és szignifikánsan növeli-e a választási részvételt – mivel a szavazás tárgya és jellege, például az, hogy országgyűlési, európai parlamenti, vagy helyi önkormányzati választásokról van szó, nagyobb befolyással bír a részvételre online formában is⁹ –, látható, hogy bizonyos választói csoportokban, például a külföldön élők körében az elektronikus szavazás miatt magasabb lehet a virtuális urnához járulók aránya.¹⁰ Az online szavazás ráadásul a kezdeti nagyobb anyagi befektetést követően hosszú távon olcsóbb és költséghatékonyabb, mint a hagyományos, offline megvalósítása.¹¹

Alapvetően elmondható tehát, hogy az elektronikus szavazás gyakorlati alkalmazása javíthatja magát a választási folyamatot azáltal, hogy a szavazás egyszerűbb, gyorsabb és rugalmasabb lesz. A szavazáson való részvételre fordított idő és energia a töredékére csökken, mivel a szavazatokat akár otthonról vagy a munkahelyről is le lehet adni ebben a formában. Az emberi beavatkozás minimalizálása csökkenti az emberi hibázás lehetőségét is, ráadásul az elektronikus formában történő szavazás lehetőséget ad arra is, hogy bizonyos csoportok választáshoz való hozzáférése és választási hajlandósága javuljon – különösen a fiatalok, vagy a külföldön élő állampolgárok körében. Az elektronikus szavazás pedig hosszú távon a választások lebonyolításának költségét csökkentheti, például a nyomtatási és postaköltségek megtakarításával.

⁶ WOLF, Peter – NACKERDIEN, Rushdi – TUCCINARDI, Domenico: *Introducing electronic voting: essential considerations*. International Institute for Democracy and Electoral Assistance (International IDEA), 2011. 6.

⁷ KITSING, Meelis: The Estonian experience shows that while online voting is faster and cheaper, it hasn't increased turn-out. *Democratic Audit blog*, 2013.

⁸ RIERA, Andreu – BROWN, Paul: Bringing confidence to electronic voting. *Electronic Journal of e-Government*, 1.1 (2003) 15.

⁹ KITSING, Meelis: Online participation in Estonia: active voting, low engagement. *Proceedings of the 5th international conference on theory and practice of electronic governance*, 2011.

¹⁰ GERMANN, Micha: Internet voting increases expatriate voter turnout. *Government Information Quarterly*, 38.2 (2021) 2.

¹¹ KRIMMER, Robert – DUENAS-CID, David – KRIVONOSOVA, Iuliia: New methodology for calculating cost-efficiency of different ways of voting: is internet voting cheaper? *Public Money & Management*, 41.1 (2021) 22.

Az elektronikus szavazás hátrányai

Mivel nincs olyan rendszer, ami tökéletes lenne, az elektronikus szavazásnak is lehetnek természetesen hátrányai, amelyekkel szintén érdemes tisztában lenni.

Az egyik legfontosabb az azonosítás nehézsége, hiszen a szavazatát elektronikusan leadó állampolgárról nem lehet minden kétséget kizáróan megállapítani, hogy azonos-e azzal, akinek mondja magát, azaz tényleg ő-e az a szavazásra jogosult állampolgár, aki szavazni szeretne. Ehhez kapcsolódóan felmerülő hátrány, hogy éppen ezért, lehetőségessé válhat a szavazásra jogosult állampolgár személyazonosságával való visszaélés is, de online szavazás esetén sokkal könnyebben valósulhat meg a kényszerítés is egy adott jelöltre vagy pártra történő szavazásban. A harmadik fél szavazásba való beavatkozása nem csak a kényszerítésben merülhet ki az elektronikus szavazás során, mivel a hackertámadások és egyéb e-bűncselekmények alááshatják a szavazási folyamatának legitimitását is.¹²

Probléma lehet, hogy az elektronikus szavazás folyamatából eleve kizáródnak azok, akik nem rendelkeznek internethozzáféréssel rendelkező eszközzel vagy eleve internet-hozzáféréssel, vagy nincs meg az a tudásuk, ami által képesek lennének az egyszerűbb, gyorsabb és rugalmasabb online szavazásban való részvételre. Látható tehát itt egy életkori, valamint egy erőforrásbeli törésvonal: az online szavazásból kizáródhatnak a digitális készségekkel kevésbé rendelkező idősebb korosztályok, valamint a jövedelmi szegény és anyagilag deprivált társadalmi csoportok, amelyeknek nincs hozzáférése az infokommunikációs technológia (IKT) eszközeihez.

Szintén probléma az, hogy a rendszer működése laikusok számára nem átlátható,¹³ ezáltal pedig jelentős problémaforrás lehet a bizalomhiány,¹⁴ ami csökkentheti az online szavazást választók arányát. Ami pedig az előnyök mellett az elektronikus szavazás hátrányai körében is szerepelhet, az a választások megszervezésének a költsége: noha hosszú távon mindenképpen kifizetődőbb az online szavazás, a kezdeti bekerülési költségek – például a technológiai-informatikai háttér kiépítésének vagy a tájékoztatásnak a költségei – mindenképpen magasra rúgnak.

Vannak tehát vitathatatlan biztonsági kockázatok. Például a távoli, digitális azonosítás nehézsége; a szavazatok leadásának, továbbításának és feldolgozásának biztonsága; valamint a harmadik fél választási folyamatba való beavatkozásának kockázata, azaz például egy hackertámadás lehetősége. De probléma lehet az is, ha a teljes folyamat egy black box-ként működik és nem teljesen átlátható, hiszen ez bizalmatlanságot ébreszthet a folyamattal szemben. Emellett az is gyakran említett hátránya az elektronikus szavazásnak, hogy a keretfeltételek megteremtése, azaz egy olyan digitális környezet kialakítása, ami lehetővé teszi a folyamatot, óriási költségeket jelent.

¹² KISS, Lilla Nóra: Ballot is stronger than bullet, but what about e-voting? E-voting as the new legal institution of the e-democracy. *Sectio Juridica et Politica Miskolc*, Tomus XXXVII/2. (2020) 201-202.

¹³ G. KARÁCSONY Gergely: *Az elektronikus szavazási eljárás egyes kérdései*. In: Szoboszlai-Kiss Katalin – Deli Gergely (szerk.): *Tanulmányok a 70 éves Bihari Mihály tiszteletére*. Győr, Universitas-Győr, 2013. 182.

¹⁴ SCHAUPP, L. Christian – CARTER, Lemuria: E-voting: from apathy to adoption. *Journal of Enterprise Information Management* (2005) 587.

Elektronikus szavazás: érvek és ellenérvek

Kérdés, hogy a gyakorlati alkalmazás tekintetében az előnyök vagy a hátrányok azok, amelyek felülkerekednek? Azaz: melyek azok az érvek és ellenérvek, amelyek az elektronikus szavazás ellen és mellett szólnak?

Az elektronikus szavazás bevezetése elleni érvek

Az elektronikus szavazással foglalkozó szakirodalomban az ellenérvek alapvetően két típusa jelenik meg: a technológiai és a társadalmi-szociológiai ellenérvek.¹⁵

Az elektronikus szavazás bevezetésével szembeni technológiai ellenérvek közül kiemelkedő fontosságú a hitelesítés és az azonosítás kérdése,¹⁶ ami komoly problémákat vethet fel, és a szavazás integritását és legalitását is fenyegetheti. Amikor egy szavazásra jogosult állampolgár le szeretné adni a szavazatát, akkor elsőként arról kell meggyőződni teljes bizonyossággal, hogy ezt megteheti-e, azaz rendelkezik-e például választójoggal. Ez a hitelesítés. Ezt követően történik meg az azonosítás, ami során megállapításra kerül, hogy a szavazni készülő személy valóban az-e, akinek mondja magát, és akinek az első lépésben a hitelesítés igazolta azon jogosultságát, ami miatt a hitelesítés megtörtént. Mivel nem létezik jelenleg olyan technika, ami a távoli azonosítás során, például elektronikus szavazás esetén is minden kétséget kizáróan tenné egyértelművé, hogy a szavazásra jogosult és a szavazatot leadni készülő állampolgár ugyanaz a személy,¹⁷ ezért ez a csalásra okot adó tényező mindenképpen az elektronikus szavazás bevezetése ellen szól.

Szintén az elektronikus szavazás ellen szóló technológiai érv az, hogy a rendszer olyan formában sérülékeny, ahogyan az offline szavazás nem az. Természetesen több körös, gondosan megtervezett és felépített biztonsági rendszer védheti a digitálisan leadott szavazatokat és az adathalmazok formájában tárolt eredményeket, viszont a szoftver egy apró hibája, egy jelentéktelen mértékű adatvesztés is súlyosan fenyegetheti a választás tisztaságát és demokratikusságát. A visszafordíthatatlan károk, visszanyerhetetlen adatok, az információvesztés a hagyományos szavazás során kevésbé fenyegetik a választást. Ezt a sérülékenységet pedig a választást befolyásolni kívánó, rossz szándékú támadások is megpróbálhatják kihasználni.

Az eljárás hitelességének is nagyon nehéz az ellenőrzése, hiszen amíg az offline szavazás során nem kell különösebb technológiai jellegű szakértelem vagy ismeret a választás során felmerülő problémák kezeléséhez, az eredmények összesítéséhez, vagy akár az egész folyamat áttekintéséhez, úgy az elektronikus szavazás során ez nem így van: magas szintű és speciális szaktudás kell ahhoz, hogy menedzselni lehessen a folyamatot, javítani az esetleg felmerülő hibákat, eredményeket gyártani az adatokból. Mindez azért érdekes, mert a Német Szövetségi Alkotmánybíróság például egy határozatában kimondja, hogy

¹⁵ G. KARÁCSONY, 2013. 180.

¹⁶ CETINKAYA, Orhan – CETINKAYA, Deniz: Verification and validation issues in electronic voting. *Electronic journal of e-government*, 5.2 (2007).

¹⁷ LONCKE, Mieke – DUMORTIER, Jos: Online voting: a legal perspective. *International Review of Law, Computers & Technology*, 18.1 (2004) 63.

csak akkor van összhangban az Alkotmánnyal az elektronikus szavazás, ha akár egy laikus is képes arra, hogy a választási cselekmény lépéseit és az eredményt bármilyen specifikus szaktudás nélkül ellenőrizni tudja.¹⁸ Az elektronikus szavazás esetében ez nyilvánvalóan nem teljesül.

Az elektronikus szavazás bevezetésével kapcsolatos ellenérvek másik csoportja a társadalmi, illetve szociológiai ellenérvek. Itt főleg a korábban már említett digitális megosztottság és digitális írástudatlanság, valamint a társadalomban az IKT-eszközök használatához kapcsolódóan meglévő demográfiai és anyagi erőforrás törésvonal az, ami az elektronikus szavazás ellen szól. A társadalom bizonyos csoportjai nem biztos, hogy készségi szinten tudják használni az elektronikus szavazáshoz szükséges eszközöket, de az is lehet, hogy nem is birtokolják őket, ez pedig széles rétegeket zárhat ki az elektronikus szavazásból.

A témával foglalkozó szerzők kiemelik továbbá a társadalom bizalomhiányát az új technológiák iránt,¹⁹ ezt a bizalomhiányt vagy félelmet pedig tovább növeli a rendszer átláthatatlan és laikusok által ellenőrizhetetlen volta; de nem elhanyagolható az sem, hogy a szavazás egy olyan ünnepi rítus, ami politikai identitástudat kialakításában fontos szerepet játszik,²⁰ ezért nem jó az, ha eltűnik, ami az elektronikus szavazás esetében felmerülhet.

Természetesen, ha az elektronikus szavazás nem kizárólag, hanem a papíralapú szavazást kiegészítve kerül bevezetésre, akkor bizonyos ellenérvek nem feltétlenül szólnak az elektronikus szavazás ellen. Viszont, ha abból indulunk ki, hogy az elektronikus szavazás a szavazási folyamatot könnyíteni lenne hivatott, vagy arra szolgál, hogy hatékonyabbá, még nagyobb tömegek számára elérhetővé tegye azt, akkor továbbra is indokolt lehet ezeknek az ellenérveknek a többsége. Hiszen, ha egy szavazásra jogosult állampolgár például azért nem fér hozzá az elektronikus szavazási felülethez, mert nincs eszköze, amivel csatlakozhasson, vagy készsége, amivel átlássa a rendszer működését, akkor az elektronikus szavazás egyszerűbb, rugalmasabb és kényelmesebb jellege esetében nem érvényesülhet.

Az elektronikus szavazás bevezetése mellett szóló érvek

Szólnak természetesen érvek az elektronikus szavazás bevezetése mellett is. Sőt: éppen ezek az érvek azok, amelyek okán megfogalmazódik a kérdés, hogy ha megvalósítható, jó és hatékony is lehet az elektronikus szavazás, ha mérhető és akár kézzel fogható előnyökkel is járhat, akkor miért nem alkalmazza Magyarország.

Az elektronikus szavazás a szakirodalom és vonatkozó kutatási eredmények szerint növelheti a választói hajlandóságot különösen olyan választói csoportok esetében, ahol ez eleve alacsonyabb, mint például a fiatalok körében,²¹ vagy a szavazásban való részvételük

¹⁸ G. KARÁCSONY, 2013. 181.

¹⁹ SCHAUPP–CARTER, 2005.

²⁰ G. KARÁCSONY, 2013. 182.

²¹ POWELL, Anne et al: e-Voting intent: A comparison of young and elderly voters. *Government Information Quarterly*, 29.3 (2012) 361.

valamilyen oknál fogva nehezebb, mint például a külföldön élő és szavazó állampolgárok esetében.²²

Az elektronikus szavazás mellett szóló érv továbbá, ahogyan az korábban is említésre került, hogy hosszabb távon sokkal költséghatékonyabb lehet, mint a papíralapú szavazás, hiszen a kezdeti befektetések magasak lehetnek, de az elektronikus szavazás idővel „behozza” az árát. Mellette szólnak azon országok jó gyakorlatai is, amelyek már sikerrel alkalmazzák valamilyen formában az elektronikus szavazást. A visszatérő példa Észtországné, ami a világon az egyik első országgént vezette be az online szavazási lehetőséget, de Európában és Európán kívül is láthatjuk az elektronikus szavazás alkalmazását egyéb országokban is.

És van két olyan specifikus terület, ami Magyarország esetében különös tekintettel indokolhatja az elektronikus szavazás bevezetését: a külföldön élő magyarok szavazásának és különböző szavazási formáinak a kérdése. A nem Magyarországon élő és magyarországi lakcímmel nem rendelkező magyar állampolgárok szavazhatnak levélben, míg a szintén külföldön élő, de magyar lakcímmel rendelkező magyarok csak személyesen, külképviseleteken szavazhatnak külföldön. Ez a szabályozás jogsértő és diszkriminatív, hiszen a választási törvény indokolatlanul tesz különbséget a külföldről szavazó magyar állampolgárok között. Ez azért különösen nagy probléma a levélszavazásra nem jogosult állampolgárok esetében, mert lakóhelyüktől függően a külképviseletre való eljutás indokolatlanul nagy időbeli és anyagi terhet róhat rájuk. Ezért több százezer külföldön élő és magyar lakcímmel is rendelkező szavazónak általában csak töredéke szavaz a választásokon. A 2022-es országgyűlési választásokra a hozzávetőlegesen 400-500 ezer külföldön élő, de magyarországi lakcímmel is rendelkező állampolgárból a 2022-es országgyűlési választásokra csak kicsivel több, mint 65 ezer fő regisztrálta magát a névjegyzékbe a törvényes határidőig.²³ Ez az, ami különösen indokolná Magyarországon az elektronikus, online szavazás bevezetését, hiszen ez megoldást jelenthetne a külföldön élő, de magyar lakcímmel is rendelkező magyar állampolgárok szavazásának problémájára,²⁴ és ebből adódóan a rendkívül ellentmondásos levélszavazás intézményére, illetve annak megszüntetésére is megoldás lehetne. Hazai kontextusban pedig ez az elektronikus szavazás bevezetésének szükségessége mellett szóló talán legfontosabb érv.

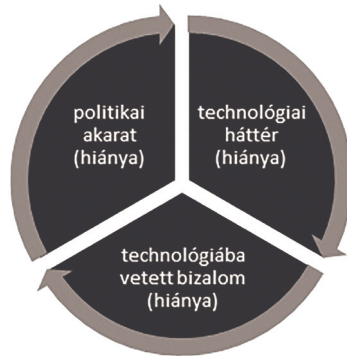
Elektronikus szavazás – lehetőségek és akadályok

Az elektronikus vagy online szavazás bevezetésének nincs eljárásjogi akadálya jelenleg Magyarországon. Ugyanakkor vannak olyan korlátok, amelyek ettől függetlenül mégis akadályozzák azt, hogy az elektronikus szavazás a gyakorlatban is alkalmazásra kerüljön, és amely korlátok egymással szorosan összefüggenek és egymásból következnek (1. ábra).

²² GERMANN, 2021. 2.

²³ <https://telex.hu/valasztas-2022/2022/03/30/valasztas-kulfoldon-elok-65-ezer-valasztasi-torveny> (2022.05.31.)

²⁴ CSERNY–NEMESLAKI, 2015.



1. ábra: Az elektronikus szavazás bevezetésének akadályai Magyarországon (saját szerkesztés)

Egyrészt nincs meg a politikai szándék, jelenleg nem fűződik politikai akarat és cél az elektronikus szavazás bevezetéséhez. Ami ennek kapcsán szintén visszatartó erő lehet politikai szempontból az az, hogy ha gyakorlati alkalmazás során kudarcot vallana bármilyen szinten a rendszer, akkor a politikai felelősség is a jogalkotó nyakába szakadna.

További probléma lehet az új technológiákkal szembeni bizalom hiánya. A társadalom számára ezek a folyamatok fekete dobozként, kiismerhetetlen rendszerekként működnek, amelyben egy inputból, például a szavazatból végül outputként megszületik az eredmény, de hogy mi történt közben, ki és hogyan kezelte az információt, az nem látható. A bizalmi szintet csökkentheti továbbá az is, hogy az elektronikus szavazás visszaélésekre ad lehetőséget akár a szavazatok manipulálása, akár a szavazásra jogosult állampolgár kilétének igazolása kapcsán. Ahhoz, hogy a bizalom megerősödjön az ilyen új technológiákkal szemben, széles körű tájékoztató kampányok lennének szükségesek, valamint a digitális írástudás szintjének a növelése. Ennek megváltoztatásához szintén politikai akarat lenne szükséges.

És itt érkezünk el a harmadik fontos ponthoz, ami magyarázhatja azt, hogy miért nincs még mindig elektronikus, online szavazás Magyarországon. Ugyanis a digitális társadalom fejlettségét és a digitális írástudás szintjét az Európai Bizottság által mérő DESI-indexben – hivatalos nevén Digital Economy and Society Index – Magyarország mindig az utolsó helyek egyikét foglalja el. A DESI-index legfrissebb, 2021-es adatai alapján Magyarország ez európai átlag alatt teljesített minden vizsgált szektorban, az összeurópai rangsorban pedig a 27 uniós tagállam közül a 23. helyen áll.²⁵ Ez pedig az elektronikus szavazás bevezetése okán nagy probléma. Ugyanis hiába van meg adott esetben a politikai akarat az elektronikus szavazás bevezetésére, hiába lesz meg a technológiai háttér, ha az emberek többsége nem tudja kezelni ezeket a felületeket. Ekkor sérülhet a választójog egyenlősége vagy akár titkossága is, például, ha a választó nem tudja leadni a szavazatát azért, mert nem tud eligazodni az online felületen, vagy ha felkér valakit arra, hogy segítsen neki az online szavazás során. Ezek a problémák analóg formában megtartott választás során

²⁵ <https://digital-strategy.ec.europa.eu/en/policies/desi> (2022.05.31.)

nem merülhetnek fel. Hogy a társadalom nagy része készségszinten tudja használni az IKT eszközöket és képes legyen nehézség és fennakadás nélkül például egy elektronikus szavazási folyamatban részt venni, ahhoz a digitális készségek fejlesztése volna szükséges, amihez pedig szintén politikai akarat.

Összegzés – Miért nincs elektronikus szavazás Magyarországon, ha lehetne?

Érdemes tehát a szakirodalom, az eddigi kutatási eredmények és hazai tapasztalatok alapján válaszolni a címben feltett kérdésre: miért nincs Magyarországon elektronikus szavazás, ha lehetne? Ahogyan az említésre került, összesen három irány körvonalazódik, ami egyelőre még gátat szab annak, hogy Magyarországon is bevezetésre kerüljön az elektronikus, online szavazás: a politikai akarat, a technológiai háttér és a technológiába vetett bizalom hiánya.

Ugyanakkor ezeknek a befolyásoló tényezőknek a közös nevezője és talán legfontosabb eleme a politikai akarat, illetve annak hiánya. Ez segítené azoknak a társadalmi és technológiai feltételeknek a megteremtését, amelyek elengedhetetlenek az elektronikus szavazás gyakorlati alkalmazásához és ahhoz, hogy az tényleg elérje a célját, azaz könnyebbé, egyszerűbbé, rugalmasabbá, összességben véve pedig emiatt – főleg az urnáktól például kényelmi okokból távol maradók számára – vonzóbbá tegye a szavazást. Egyelőre azonban még nincs napirenden az, hogy bármely hazai választáson – az ellenzéki oldal 2021 őszén lefolytatott előválasztási folyamatától eltekintve – „élesben”, azaz országgyűlési, helyi önkormányzati vagy európai parlamenti választásokon vagy népszavazás során bevezetésre kerüljön az elektronikus szavazás.

Az elektronikus szavazás magyarországi bevezetése melletti legerősebb érv az, hogy megoldást jelentene egy régóta fennálló problémára: a külföldön élő magyar állampolgárok szavazására. Az ő esetükben, de különösen a magyarországi lakcímmel rendelkező, külföldön élő, és csak külképviseleti szavazásra jogosult állampolgárok esetében jelentene előnyt az, ha lehetővé válna számukra, hogy a szavazásra fordított tetemes anyagi vagy időbefektetés, utazás vagy órákig tartó sorban állás helyett néhány kattintással, a világ bármely pontjáról leadhassák voksukat.

MELINDA PINTÉR

Electronic voting in Hungary: why not if it could be?

(Summary)

Electronic voting has already been successfully introduced in many countries in Europe and around the world, but this method has not yet been applied in Hungary - although digitalization and the wide adaptation of the practices of the digital state are also supported by the European Union. The question is why this is so, since electronic voting can not only simplify the election procedure, but can also increase voter activity, and it can also be a solution to specific problems, such as the difficulties of voting for citizens living abroad. The purpose of this study is to review: what are the advantages and disadvantages of electronic voting, what are the arguments for and against its introduction in Hungary, and whether there are any technical or legal obstacles that currently prevent or make the use of electronic voting impossible in Hungary.

SUAD, MAHAMMED

Electronic Arbitration – What and Why!

Introduction

We cannot overlook the technical progress made this century, which was not limited to a single science or party. Rather, all walks of life are affected by it. We cannot rule out the completion of legal work, the conclusion of contracts, and the execution of such contracts in certain cases because of technical advancements, as well as the resolution of their conflicts using the same technology for electronic resolution. That is, the procedures are carried out over an electronic network without the parties having to be present in the same place.

The year 2020 was the greatest evidence of the need for humans, especially dealers – from the point of view of law – for international commercial contracts, whose owners cannot be in the same place, to regulate such electronic transactions that are concluded and settle their disputes on the electronic network.

Because of the nature of the Internet, a new type of arbitration has emerged, which differs from traditional dispute resolution mechanisms. This form is completed on a computer screen, in accordance with the nature of electronic commerce, which disregards spatial boundaries. The importance of electronic arbitration extends to what it raises in terms of procedural and substantive legal issues that are directly related to the concept of arbitration itself in its abstract framework, as well as to structures and institutions on the one hand, and judgments on the other hand in their electronic framework.

Although the topic of electronic arbitration in and of itself makes us stand in front of many controversial issues that deserve the uniqueness of studying a research on its own, I want to be satisfied with seeking to achieve one goal of this research, which is to be able to define what the electronic arbitration agreement is as a term and a modern concept, and access to understand the substantive and procedural legal aspects related to it, all of this as a means of resolving electronic commerce disputes.

It can be said that electronic arbitration begins with the first step, as does traditional arbitration with the parties to the disputed legal relationship over their choice as a method for settling the existing dispute between them.

Electronic Arbitration

The definitions of electronic arbitration varied and varied according to the angle from which each jurist deals with arbitration. Some have defined it as “*the agreement of the parties to a legal relationship to submit the dispute that has arisen or that will arise in the future from electronic or ordinary commercial relations to arbitrators to settle the dispute through electronic procedures and issue a binding judgment on it.*”¹

Other jurists defined it as: “*Arbitration takes place via the Internet or any other electronic means for resolving electronic disputes, so that the dispute and its procedures are presented, and the decision is issued and notified electronically.*”² If traditional arbitration means the parties agree to submit the dispute to a specific person or persons to settle it outside the framework of the competent court, then the term “*electronic*” means relying on technologies that contain everything electrical, digital, magnetic, wireless, optical, electromagnetic, or other means. Similarities, with the aim of conducting arbitration using electronic media, methods, and networks, including the Internet.

The jurists agreed on the direction that is required for arbitration to be considered electronically to take place entirely through electronic means, whether in terms of concluding the arbitration agreement or at the stage of the arbitration dispute or the issuance of the judgment.³

Some believe⁴ that it is not possible to deny the role of traditional arbitration rules in contributing to the emergence of electronic arbitration, but at the same time it should not be overlooked that there are new rules and customs that formed a kind of independence for the new type of arbitration, and it should be studied as an independent type of alternative solutions to disputes. Online contracting for arbitration before the issuance of laws regulating electronic arbitration, and it has arranged effects that cannot be overcome despite the lack of reference to any of the agreements.

Arbitration can be fully or partially electronic, such as:

- Partly, Through the agreement of the parties themselves or between them and the arbitration institution electronically to conduct arbitration, by exchanging electronic messages in the first place, and what is between them and the electronic arbitration center, or by filling out a form for some of these institutions that practice their business through the Internet. After the electronic agreement, the arbitration procedures take place face to face.

¹ HUSSEIN, Shehadeh Al-Hussein: *Electronic Arbitration in International Trade Disputes: A Study in the Context of International Commercial Law and Syrian Law*. Hassan I University, 2018. 124.

² RAJAA, Nizam Hafez Bani Shamsa: *The Legal Framework for Electronic Arbitration – A Comparative Study*. Master Thesis, An-Najah National University, 2009. 97.

³ The Sixteenth International Conference entitled International Commercial Arbitration organized by the College of Law of the United Arab Emirates University in cooperation with the Emirates Center for Strategic Studies and Research. AL-NUAIMI, Alaa: *The Legal Framework for the Electronic Arbitration Agreement*. *University of Sharjah Journal of Sharia and Legal Sciences*, Vol. 6. No. 2 (2009) 969–1019.

⁴ MATAR, Essam Abdel-Fattah: *Electronic Arbitration*. The New University House, Alexandria, 2009. 41.

- Fully, That the arbitration procedures are carried out by electronic means, such as holding sessions via the Internet by using visual or audio means, or even by exchanging electronic messages among the members of the arbitral tribunal, and in more advanced stages it is possible to hear the testimony of witnesses and issue the arbitration decision electronically.

Based on the foregoing, electronic arbitration can be defined as: “*Arbitration that takes place over the Internet, according to special rules without the need for the parties to the dispute and the arbitrators to meet in a specific place.*”

Some international legislations have referred to this type of arbitration in many texts and recommendations. Whereas the aim of electronic arbitration is to purify and secure the electronic work environment, and what is related to it by settling or resolving existing electronic disputes and providing advisory services that would prevent disputes from occurring for a sound digital society.⁵

There are many additional features that distinguish electronic arbitration from traditional arbitration than ease, speed, and confidentiality of procedures, such as:

- The lack of commitment for the parties to move from one country to another in order to attend the sessions and exchange documents and documents, so that the latter are exchanged instantly and in real time on the information network (the Internet) or by fax, which corresponds to the fact that time is an essential element in economic transactions.
- Prompt issuance of judgments for the ease of procedures as documents and papers are submitted by e-mail, and experts can be directly contacted or chatted with them via the Internet, and it is noted that the many advantages enjoyed by electronic arbitration have contributed to the effectiveness of the self-rights of users in the virtual world.
- Some add⁶ that resorting to this type of arbitration avoids the parties to the contract not to comply with the law and the judiciary with regard to electronic contracts, whether legally or judicially, as it avoids them not legally recognizing these contracts or the difficulty in determining the applicable law and determining the competent court, and this matter is not an easy matter according to the ordinary judiciary when referring the dispute to it.
- The low cost, in proportion to the size of the concluded electronic contracts, which are often not large but modest, and sometimes multimedia systems are used that allow the use of audio-visual means to hold arbitration sessions on the direct line of the parties and experts, and this reduces travel and transportation expenses.
- Despite these advantages of electronic arbitration, there are some problems and obstacles that encounter it, which are as follows:

⁵ NABIL, Zaid: Electronic Arbitration. *Jurisprudence and Law Journal*, 2014. 5.

⁶ NABIL, 2014. 13.

- Eligibility, Since the arbitration process is within an electronic nature in the vast Internet space without an actual meeting between the parties to the arbitration themselves or between the parties and between the arbitration institution, it is possible that verifying the eligibility of the parties is a difficult process because it is easy to circumvent it.
- Ensuring the confidentiality of the arbitration process, the problem here does not only lie in the internal disclosure of information through one of the parties who have access to the arbitration process procedures, because in this case a contract is signed to respect the confidentiality of this information through which the information inspectors bear full responsibility. But the problem here is the danger coming from the outside in what can be called the penetration of intruders, curious people and fraudsters who roam the vast Internet space without any restrictions or censorship. The only solution currently presented is to encrypt the saved and exchanged data in a way that prevents it from being read except by the addressee.
- Inconsistency with national legislation, as we know that the national legislations, in most of them, did not respond to the developments that occurred in the traditional trade, which in turn produced new forms and areas of trade. The most important of which is electronic commerce, as it has been developed to suit the norms and rules that have been established in the light of traditional commerce, and this in turn has been reflected in electronic commercial arbitration and the extent to which countries recognize its existence and its provisions.
- Raising some procedural and substantive obstacles, those related mainly to the right to defense, the right to oral pleading, the principle of confrontation, and other matters that clash with the electronic nature of arbitration.

Problems and Obstacles to Recognizing Electronic Arbitration

Electronic arbitration as a newly developed mechanism for electronic settlement of disputes is encountered by many problems and obstacles in its recognition, which require to confront it seriously thinking about its development methodologically and structurally. The problems raised by electronic arbitration in international trade disputes are mainly due to:

1. The failure of the internal legal systems to keep pace with the rapid development taking place in the field of electronic commerce contracts, as most of these systems do not legislate for electronic commercial transactions in their laws, in addition to the stagnation experienced by the legal rules related to traditional litigation and arbitration procedures, which exist in many countries of the world from the lack of recognition of the arbitration procedure by electronic means And not to amend the existing legislation to recognize the electronic arbitration provisions, and from here the question arose about the validity of the settlement procedures by electronic means? And the extent of recognition of the electronic arbitration award? And determining the place that is considered the place of

arbitration, is it the place of the individual arbitrator, or the place of the supplier or user in electronic information service contracts, or the place of concluding or implementing the contract?

2. The question about the validity of the electronic arbitration procedures, and therefore the question about the extent to which the arbitrators' judgment fulfills the elements of its implementation in light of the existing rules of traditional arbitration in terms of the possibility of accommodating these rules as they exist for the applications of electronic arbitration or the need to develop them to respond to the nature of the electronic communication methods used in the completion of electronic arbitration procedures.
3. The reality of the spread of e-commerce applications and the widespread use of modern communication technologies such as e-mail in the transmission of messages and documents, gives the issues raised using these techniques in managing the arbitration process a special importance in that the recognition of the judgment issued will face an obstacle to its implementation in countries where there is no need for their courts. Recognizing judgments issued in arbitration cases that have been considered and passed ON LINE, as well as arbitration judgments that are based on arbitration clauses contained in electronic contracts.
4. Even if Article II obliges the first paragraph of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, the state's party to it to recognize arbitration agreements and order the enforcement of foreign judgments, but it guaranteed this commitment many conditions, including that the arbitration agreement be in writing and signed, and that the arbitration award is approved. These conditions need to verify the availability of their requirements in the electronic methods for settling disputes. The need to consider expanding the concept of writing and signature to accommodate the development that followed them.⁷
5. The arbitrator's failure to apply *jus cogens* rules. The parties, especially the weak party in the contract, are afraid of resorting to arbitration in general and electronic arbitration in particular, because of the fear that the protective peremptory rules stipulated in the national law will not be applied, especially if this party is a consumer, which results in the invalidity of the arbitration ruling. and the impossibility of implementing it.
6. Also, when choosing the applicable law other than the consumer law to rule the dispute, the arbitrator will not apply these protective rules stipulated in the national consumer law because he only applies the chosen law, and considering that he is not a judge, he is not obligated to apply *jus cogens* even in the country in which it is located. The seat of the Arbitration Court, so many opposed resorting

⁷ TOJAN, Faisal Al-Sharida: *What and Procedures of Electronic Arbitration as a Means of Resolving Electronic Trade Disputes*. 2009. 7110.

- to arbitration because the protection of the weak party is always through jus cogens rules set by state legislators to protect a particular sect or collective interests.
7. Assessing the validity of the arbitration agreement. The validity of the arbitration agreement is assessed in accordance with the New York Convention by referring to several laws, including the law of the country in which the judgment was issued, with which it is assumed that this country can be determined and therefore the judgment is issued in the territory of a specific country, which is unimaginable in If the judgment is issued and edited on a website on electronic communication networks.
 8. The New York Convention also includes texts that assume that arbitration procedures are conducted in a specific place or in the territory of a specific state, and then the violation of these procedures to the law of this state is one of the reasons for refusing to recognize and implement the judgment.
 9. For this reason, a question was raised that whether the arbitration procedures that take place through electronic means are national procedures to which the law of the judge applies in the traditional sense, or are they floating procedures?
 10. The description of arbitration as national or foreign is related to the idea that it takes place in a particular place, and this description depends on the state whose courts are required to issue the order to implement the arbitration award and whether it was issued in one of its regions, and whether the arbitration procedures were subject to the applicable law Where or whether the judgment was issued outside its territory.⁸
 11. Determining the place of arbitration, some of the existing arbitration rules are related to the application of the focus of arbitration spatially in terms of the place of arbitration itself and the place of issuance of the arbitral award. For this reason, the question was raised about how to determine the place of issuing the electronic arbitral award in the case of arbitrators residing in different countries agreeing on the merits of the award by fax or E-mail, since the effects of the mentioned rules on determining the place of arbitration require examining how to determine it in the case of arbitration via electronic communication networks.
 12. The nature of these networks raises the question about the place and time in which the arbitral award is considered to have been issued on the one hand, and about the ability of the award to be recognized and implemented under the existing rules in the event that the evidence on which it relied is presented and loaded on electronic media on the other hand, which can be directed to from Challenges related to ensuring its authenticity and confidentiality of its procedures are many.
 13. The fact that there is no real place for arbitration in the electronic arbitration system is what justifies these questions. The place is defined figuratively or by

⁸ TOJAN, 2009. 1108.

default, and neither the parties nor the arbitrators meet in it, but rather it is done online via electronic communication networks.⁹

Electronic Arbitration Panels (Sources of Electronic Arbitration Awards)

The reality of dispute settlement outside the judicial framework has found a wide range of actual, diverse and comprehensive applications for electronic commerce disputes, in terms of being a logical result of the serious tendency to make maximum use of what is provided by the possibilities offered and provided by the digital environment and electronic means of successive development and expansion, in order to reach a conclusion Success in completing the procedures of traditional methods of dispute settlement, such as negotiation, mediation, conciliation and arbitration, but through the Internet.

Several private initiatives have adopted some economic and regional organizations and professional associations in this field mainly interested in keeping pace with the rapid development, which is considered through this an important source from which electronic arbitration derives its provisions, and these organizations and bodies can be listed as follows:

European Union

In view of the importance and effectiveness of electronic arbitration, most countries and international organizations have tended to issue laws concerned with the subject and allow the parties to resort to it via the Internet in their rules, and it is noted through this that the European Union is leading in this endeavor in terms of taking some serious and effective steps in this field, including:

- Article 17 of the European Directive on Electronic Commerce No. 31/2000, which stipulates allowing member states in the event of a dispute between information service providers and their clients to settle these disputes outside the courts and using electronic means.
- The European Union directing member states and urging them not to place legal obstacles in their internal legislation that prevent the use of dispute settlement mechanisms outside the judiciary. Article 1 of the European Directive on Electronic Commerce No. 31/2000 stipulates: “*Member states must allow information service providers and their clients to settle their disputes away from the corridors of the courts and using technological means in the electronic world.*”
- The European Committee for the Settlement of Consumer Disputes has essentially issued a Recommendation for the adoption of a series of Directives on Conflicts On Line.

World Intellectual Property Organization

The World Intellectual Property Organization is playing an increasingly important role in the process of developing and activating the e-commerce arbitration system and regulating

⁹ KHALED, Mamdouh Ibrahim: *Electronic Arbitration in International Trade Contracts*. I 01, Dar Al-Fikr University, Alexandria, 2008. 525.

Internet-related disputes, mainly related to intellectual property, domain names and trademarks.

This system was able to effectively overcome many difficulties in that it allowed freedom to choose the applicable law and also ensured the unity of the penalty despite the different nationalities, especially in view of the fact that resolving commercial disputes related to intellectual property rights is a very vital issue if it is taken into account the speed of separation and the low cost. Providing alternative solutions to distinguished judicial methods with long term and high cost.

The WIPO Arbitration and Mediation Center has provided great assistance in the field of resolving disputes between individuals and companies in the world after the increasing importance of electronic commerce contracts, and the center includes a long list of specialists from arbitrators and mediators in this field from 70 countries, and these countries are subject to WIPO laws in conflict resolution methods.

In fact, WIPO enjoys a special preference among companies that avoid engaging in costly and long-term lawsuits. WIPO has been famous for being the organization that provides its quick services in settling disputes related to registration or misuse of names on the Internet, and offering these services on higher domains than the public domain, such as com, net and org, as well as on local domains through which trademark owners can send their complaints using the voucher forms available on the organization's website address, where all stages are completed online, and effective decisions are obtained within two months of raising the dispute to it.

Virtual judge

Despite the importance of the recommendations and decisions issued by the European Union and the great qualitative efforts made by WIPO, the first practical experience of resolving e-commerce disputes using the Internet was represented by the Virtual Judge Program, a project launched experimentally in March 1996 for arbitration via the Internet with the aim of settling disputes arising between Internet users and those affected by illegal messages or files and between those in charge of the various systems in terms of directing complaints and claims for compensation against them.

The virtual judge project is an American project prepared in cooperation between the Center for Law and Information Security at Villanova University VILLA NOVA CENTER FOR LAW AND INFORMATION POLICY and between the CYBERSPACE LAW INSTITUTE Institute of Law and in 1999 the project was transferred to the Kent Chicago School of Law at Illinois Institute of Technology. It is supported by the American Association of Arbitrators (AAA), the Internet Law Institute, and the National Center for Informatics Research.

The project initially aims to give quick and impartial solutions to Internet-related disputes through a mediator accredited by the Center who has legal experience in arbitration and the laws governing electronic commerce and its contracts, Internet law, trademark and intellectual property disputes, and the arbitrator is appointed according

to the system of the virtual judge by the Arbitration Association America is among a pre-prepared list of qualified arbitrators.

The arbitration court, according to this system, consists of one or three arbitrators. The appointed hypothetical judge conducts dialogue with the parties to the dispute who have requested submission to this system by e-mail, and the dispute is decided upon within 72 hours of its presentation, and the arbitrator's decision is devoid of legal value until the parties accept it.

The virtual judge system is concerned with hearing disputes arising from the use of information networks or between their users and those in charge of managing them, through which one of the users requests compensation for the damage inflicted by him as a result of messages or information that does not meet the legal form.

What is the electronic arbitration agreement?

Some define an arbitration agreement as “*the agreement by which the parties agree to refer their financial dispute under private law arising from the original contract to arbitration. Instead of adjudicating according to the terms and conditions of that agreement*”.¹⁰

The electronic arbitration agreement is the first step in electronic arbitration and the basis for its establishment, and its definition does not differ from the traditional arbitration agreement. It is just that it is done by electronic media.

It is permissible to resort to electronic arbitration in the final contracts, and this does not prevent – from resorting to arbitration in the case of a promise to contract, and it is not required that the financial relationship arises from a contract, rather – rather. It arises from any other source of the involuntary obligation, such as the harmful act and the beneficial act or through the law, but in these cases the agreement must be the arbitration effect arises after the occurrence of the cause of the obligation, unlike in the case of contractual obligations, as in the cases of compensation for offenses of electronic publication, which means that there is no-anyone or after the conflict.¹¹

The dispute agreed to be referred to arbitration must arise from a specific legal relationship or a set of specific relationships,¹² and there is no dispute in the permissible-to-agree. Arbitration in future issues that may not occur, finally. But the significance of it is that it arises from a specific legal relationship in the contract to which the arbitration agreement is based. An electronic arbitration agreement has the advantage that it takes place in a virtual world where there is no paper and traditional writing, and there is no need, under this agreement, for the physical presence of the parties or members of their committee. What results from this agreement is a litigation that ends with a judgment that is issued in an electronic form appended to an electronic signature and sent to the parties using electronic means of communication. In front of it e-mail.

¹⁰ BADI EI, Farzaneh: Online Arbitration Definition and Its Distinctive Features. ODR, Vol. 684 of *CEUR Workshop Proceedings*, (2010) 87.

¹¹ PAULSSON, Jan: Arbitration in Three Dimensions. *LSE Law Society Economy, Working Papers*, (2) 2010. 7. http://eprints.lse.ac.uk/32907/1/WPS2010-02_Paulsson.pdf (11.10.2021.)

¹² BADI EI, 2010. 90.

The term electronic arbitration agreement has two meanings, the first is that the parties to the dispute have agreed to settle their dispute through traditional means of arbitration, but the arbitration agreement was reached by electronic means, and the second is that the parties to the dispute have agreed to resort to arbitration to resolve their differences by using modern technology means.¹³

The legal nature of the electronic arbitration agreement

The nature of the electronic arbitration agreement does not differ from the nature of the arbitration agreement in general. The arbitration agreement is, in turn, a valid and binding contract for both sides, but what distinguishes it is how it is carried out.

Conditions necessary for the validity of the electronic arbitration agreement

The arbitration agreement is a legal act issued by two wills in order to establish an obligation on them to refer the dispute that arises between them to arbitration. It does not depart from being a contract subject to general rules in this regard and therefore requires the availability of formal and objective conditions to be valid.

Objective conditions:

I. Consent in the Electronic Arbitration Agreement:

Consent as a cornerstone of contracts in general means the agreement of two wills to have a legal effect, and consent is meant in the arbitration agreement in application of that, the consent of the two parties to the dispute to take arbitration as a means to resolve the existing or potential dispute in the future.

For the element of consent to be available in the arbitration agreement, it is necessary, in principle, to have consent and the correct expression of will in the electronic arbitration agreement.

The conclusion of the electronic arbitration agreement is done through an electronic means, which means that the expression of the will is through this electronic means where the offer is directed through it and acceptance is received through it. By clicking on the icon of the phrase “*I accept*” or “*Add to cart*”, the sign accepts the contract or accepts the purchase.

If this means is valid for expressing the will and transferring it to the other party, can the law be considered as a means of expressing the will in the form that entails legal effects on expression?

Jurisprudence agrees that there is nothing in the general rules that prevents the complete expression of the will by electronic means, as long as it is consistent with the general principles related to the means of expressing the will. Expressing the will is done by wording, writing, or customary sign, or by taking any other course that does not leave the circumstances of the situation in doubt as to its evidence of consent. Therefore, for a site visitor to click on a certain icon indicating

¹³ EMAD, Al-Din Al-Mohammed: *The Nature and Patterns of Arbitration with a Focus on Online Arbitration*. Legal research, 2008. 23. www.alittihad.aeldetails.php?Ip=1963/2y=2008 (08.12.2021.)

consent to the contract and agreeing to its terms contained on the site's page, the circumstances of the situation do not leave any doubt as to its evidence of consent. And to be counted by clicking on the icon that indicates acceptance as an expression of will, it should:

- The visitor must have seen the arbitration clause as well as other terms in the contract.
- The contract should not be executed before pressing the acceptance icon. If the contract can be implemented partially or completely before pressing the acceptance icon, clicking on it is not considered an acceptance of the terms of the contract or the arbitration clause.¹⁴

The validity of consent is achieved as the general rules require that the consent of both parties is free from defects of will on the one hand, and that it is issued by a qualified person on the other hand. Regarding the merchant, there is no dispute about the necessity of his eligibility or its existence, as his practice of commercial activity in a professional manner confirms that he has the necessary eligibility to practice commercial activity, which is full eligibility.

II. The place in the arbitration agreement

The arbitration agreement does not deviate from the general rules that stipulate that every contract must have a place to be added, and that this place is subject to the contract's ruling. The origin in international trade is that the contracting parties enjoy great freedom in determining the issues that are subject to arbitration. However, some legislations impose restrictions on the parties' freedom to subject the dispute to arbitration, stipulating that it is not subject to arbitration, such as those provided by consumer protection legislation.

Such a prohibition is due to the legislator's desire to inform the consumer of protection, as it decides for the rights in its national law that support its weak position and modify the supposed imbalance in the relationship between him and the professional trader. Electronically contracting and acknowledging this means that it is not permissible to agree on electronic arbitration if one of the parties is a consumer.

Jurisprudence and the judiciary have tried to take a middle position on the issue of the possibility of a dispute to be arbitrated when one of its parties is a consumer by standing on the wisdom of not resorting to arbitration and choosing a law other than the national law as a law applicable to the dispute, which can be returned to the fact that the consumer may agree to the terms The contract, including the arbitration clause without foresight and a balance between resorting to arbitration and resorting to the national judiciary and the application of national law, and he may not have the option to conduct such balancing at all because the merchant is alone in preparing the contracts that the consumer who wants to contract is supposed to agree to them in whole and in detail.

¹⁴ AL-NUAIMI, 2009. 997.

This agreement carries the fear that the consumer will waive his rights in advance, so it is forbidden to arbitration that takes the form of an arbitration clause without stipulating arbitration where this fear is eliminated because the arbitration agreement is later based on the dispute.

To give the consumer a choice between arbitration and recourse to the judiciary, online commercial sites follow two methods:

- The merchant who owns the site provides a unilateral pledge to consumers who conclude their contracts through the site to resort to arbitration to resolve the disputes that arise from dealing with it, and in confirmation of the merchant's commitment to his pledge, the virtual court places its ratification on the site as confirmation of the owner's commitment to resort to arbitration.
- The inclusion of a clause in the contract concluded between the consumer and the merchant, according to which the consumer has the option to resort to the judiciary or arbitration to resolve the dispute that may arise from or because of the contract.¹⁵

Formal conditions:

I. Writing as a formal condition of the electronic arbitration agreement

If the writing condition is available in the accepted written writing, the question arises about the availability of this condition in the electronic arbitration agreement, meaning what is the rule of electronic writing used in editing the arbitration agreement and what is its legality?

Writing in its traditional sense is written on paper supports, but the technological development in the means of communication has led to the need to expand this concept, and then there is nothing to prevent writing from being written on an electronic support if the same goal is achieved. It can be kept and referenced in case of dispute without any modification or distortion.¹⁶

Writing is a condition for the validity of the arbitration agreement, as stipulated by the 1958 New York Convention in Article Two, Paragraph Two, and Article Two, Paragraph Seven of the UNCITRAL Model Law,¹⁷ while we find that the Swedish and French Arbitration Laws do not require the arbitration agreement to be in writing. They have the Geneva Convention on International Arbitration of 1961, and there are laws such as the German Arbitration Law, the English Arbitration Law, and the Swiss Private International Law, which are more in line with the data of globalization, as the arbitration agreement is considered written if it is concluded electronically.

¹⁵ Al-Nuaimi, 2009. 1004–1019.

¹⁶ KHALED, 2008. 294.

¹⁷ EMAD, 2008. 104.

The difference in national and international laws on the issue of the extent to which the writing requirement in the electronic arbitration agreement has been fulfilled has prompted international organizations to issue agreements that take the expanded form of writing, including the draft international commercial arbitration law being prepared by the UNCITRAL Committee, which stipulates that “*The arbitration agreement must be in writing, and the writing includes any form that provides a tangible record of the agreement, and it must be accessible in another way as a data message so that it can be used in a later reference*”, which indicates that arbitration agreements can be concluded by another means. It does not have the form of paper documents such as electronic communications, for example.¹⁸

II. Signature as a formal condition of the electronic arbitration agreement

The New York Convention of 1958, the UNCITRAL Act of 1985 and most national arbitration laws require that the arbitration agreement be signed by the parties to the dispute on the grounds that the signature – in its traditional form – is useful for two reasons: first, confirming the consent of the signing party to the contract, and second, confirming the completion of the preparation of the document and Identification of the parties.

Although some legislations such as the Law of Electronic Signatures and the American Domestic and International Trade show a tendency to accept an electronic signature, the problem lies in the fact that the definition of an electronic signature differs from one country to another on the one hand, or in the lack of some countries adopting a clear position on the issue of electronic signature on the other hand. Or that its legislation imposes different conditions for recognizing its legitimacy legally from a third party.

What we find is that many consider the electronic signature on the arbitration agreement, whether it is in the same original contract or in a separate document, as fulfilling the requirements of the traditional signature.

And the electronic signature has been granted the legal legitimacy of the traditional signature in many countries’ legislation, and in 2001 the United Nations Commission on International Trade Law adopted the Model Law on Electronic Signature, which defines it as including any information stored in an electronic way that can be used to identify the owner of the signature and confirm his approval of the information contained in this electronic document. In 2000, the European Parliament adopted the European Guide to Electronic Commerce, which demanded the removal of legal and material obstacles that stand in the way of recognizing the legitimacy of electronic contracts and their fulfillment of the writing and signature requirements. Logically related to other electronic data that is used as an authentication method.¹⁹

¹⁸ KHALED, 2008. 296–297.

¹⁹ EMAD, 2008. 1044–1045.

In general, the electronic document must include the names of the parties to the dispute and the text of the arbitration agreement itself in terms of the offer, acceptance and conditions contained therein. This information should be stored electronically in a way that allows the right to access and review it later and use it as evidence to prove the validity of the arbitration agreement, so that no It can be falsified, or its content may be modified.²⁰

Conclusion

Scientific and technical development in our present age has always placed the law in front of many confusing situations that require it to take organized and specific positions for the substantive and procedural frameworks related to it. Increasingly urging the law to expedite the establishment of the necessary principles and foundations that this new direction of trade needs to be an organized and clear legal structure for it.

Although the law found some ease in regulating the subject of electronic commerce, it found great difficulty in developing legal means to deal with disputes from the subject and consistent with its nature, which takes place in the digital environment, which led to the adaptation of traditional legal means to resolve disputes to respond to the privacy of trade electronic arbitration to be the appropriate means for arbitration in the electronic form.

We proved through this paper that electronic arbitration has become a reality in the world and has even reached far stages of progress and development in view of its response to the requirements of the digital world. Countries miss taking specific positions and taking great strides in accepting and absorbing this aspect of arbitration, especially with regard to the recognition and regulation of legal centers arising from the electronic arbitration process and the implementation of judgments issued by it.

What this position requires is the necessity of amending international commercial arbitration laws and creating national laws for electronic arbitration that include its various elements and topics, as well as the necessity of developing treaties and laws related to the field of implementing electronic arbitration rulings.

²⁰ EMAD, 2008. 1045.

TÓTH, SZIMONETTA

The Relationship Between AI Risk Analysis and Prosecution in the United States of America

Introduction

Many people believe that only humans are capable of bias, but machines are not. Humans create programs, which implies that, just as infants learn certain behaviors from their parents, computers are influenced by the algorithms and data sets that they are fed. Pre-existing disparities may emerge at any time, and they can be reproduced, which “Big Data” companies do not assist with – rather, these discrepancies are magnified and developed many times over. These are referred to as algorithmic biases.¹

Artificial intelligence is propelled forward by Big Data. Big Data and machine learning make it possible to automate human decision-making. These automations can occur in governance, criminal justice, or other sectors where previous injustices may be replicated as a result of algorithmic biases.

Risk analysis algorithms are employed to help decision-making in many sectors of life in today’s digital society, including criminal justice. The core premise of such risk assessment software is that it makes predictions on behalf of the predictive justice system, basing them on an established profile and employing probability calculations. Several types of crime forecasting can be distinguished based on their field of application: those that assist the police in their crime prevention work and law enforcement, and those that are sentencing-focused which are employed strictly in the field of criminal justice.

In the United States of America, the need and justification for the use of algorithm-based risk analyses has been driven by one of the biggest problems in the wider criminal justice system, which is overcrowding in prisons. The country has an extremely high prison population due to the strict use of criminal law as a deterrent for committing crime. This

¹ CARTER, Michael: *A technológia veszélyei a kisebbségek és az őslakosok jogaira nézve*. In: Grant, Peter (szerk.): *Kisebbségek és őslakos népek 2020. Középpontban a technológia*. Minority Rights Group International, London, 2020. 29. https://minorityrights.org/wp-content/uploads/2021/02/2020_MR_Report_Hungarian_Final_WEB.pdf (20.04.2022).

is, of course, far too costly. So, it is not surprising that in recent years economic austerity has become a central issue in the US criminal justice system. To prevent the overcrowding of prisons, all member states use various assessment tools based on computerized risk analysis.

Risk Analysis

Pre-sentence investigation reports (PSIs) (report prepared by a probation officer with the department of corrections in anticipation of a sentencing for a person who's either entered a plea to a criminal felony or is being sentenced after trial) have been used in the United States for decades, and in recent years a new element has been added to the information base in several member states: the information system-based risk analysis data.

The essence and basis of risk assessment software is that, on the basis of an established profile, probability calculations can be used to make predictions. Such risk assessment systems are also used by the police and crime prevention to determine which places become crime hotspots, or which people with a certain profile are more likely to commit a crime. It is important to link databases along data such as the persons involved, the places where the crime was committed, the means of offence... An artificial intelligence program operates this risk assessment software, the main purpose of which is to use probability to make predictions for predictive justice based on an established profile. The decisions made by AI and the risk assessments it performs also influence the chances of bail, conviction, and parole.² Risk analysis is also employed in the prison system as a technique for predictive forecasting. Algorithms are used to categorize convicts into low, medium, or high-risk categories based on pre-defined risk criteria, and to relate them to things like parole eligibility.³ In the case of sentencing, it is a matter of using mathematical methods to predict not only whether the accused is expected to appear at trial, but also what the ideal sentence would be, in terms of gender, level, and content, based on the defendant's criminal history and the type of offence committed, and which would serve both general and specific prevention purposes.⁴

The use of Big Data sets in predictive policing could logically lead to the use of Big Data sets for predicting prison sentences – an equally troubling concern, given the potential for algorithmic bias in the wake of a criminal justice system fueled by institutional racism.

In almost every state in the United States, AI-assisted pre-trial risk analysis is used before trials to assess the likelihood that a defendant will, for example, recidivate or even appear at trial.

² FANTOLY, Zsanett – LICHTENSTEIN, András: Számítógépes kockázatelemzés és büntetőeljárás. *Belügyi Szemle* 66. évf. 10. szám (2018) 5.

³ MONAHAN, John – SKEEM, Jennifer L.: Risk Assessment in Criminal Sentencing. *Annual Review of Criminal Psychology*, 12 (2016) 500. <https://www.annualreviews.org/doi/10.1146/annurev-clinpsy-021815-092945> (28.03.2022).

⁴ FANTOLY–LICHTENSTEIN, 2018. 5–6.

Criminal statistics data collection can be divided into several generations. Following Cesare Lombroso's theory of criminal anthropology⁵, the first registers were produced in the early 20th century that summarized the non-physical variables that inclined people to commit crimes and were anticipated to detect potential offenders, the first of statistical risk analysis. The second generation supplemented the previous generation with characteristics of the criminal and the crime committed. The third generation examines dynamic factors; the fourth generation considers not only the offender's behavior and conduct, but also, for example, directly recommending a plan of action and treatment to the court and the prison service or advertising themselves as being able to predict whether the offender will appear in court.⁶

As it was already mentioned, in the United States of America AI assisted risk analysis is used in almost all member states; the assessment tools are the following: COMPAS⁷, LSI-R⁸, PSA⁹.

COMPAS

COMPAS is one of the most well-known of these fourth generation „automated decision support“ risk analysis systems. COMPAS is a closed-source software developed by Northpointe. Northpointe's algorithm is protected by a license thus is not open to independent verification. This is also known as black-box theory¹⁰, since a black-box in systems theory typically refers to a device whose internal workings are not known, and therefore can only be examined by its input and output. The lack of transparency and the relative opacity of the operation of the algorithm and the evaluation of the data have opened the door to criticism. During hearings, judges are often shown the results of COMPAS, but defendants and their lawyers are not allowed to see it in its entirety.

Northpointe, the creator, claims that their system, which considers 137 criteria, can be used to forecast the defendant's recidivism with such accuracy probability¹¹ that it is currently being used in criminal procedures in various US Member States, such as punishment and sentencing. The risk factors can be many, but essentially the offender's

⁵ BROOKES, Elisabeth: Cesare Lombroso: Theory of crime, criminal man, and atavism. *Simply Psychology*, July 20 (2021) <https://www.simplypsychology.org/lombroso-theory-of-crime-criminal-man-and-atavism.html> (02.04.2022).

⁶ FANTOLY-LICHTENSTEIN, 2018, 8–10.

⁷ Correctional Offender Management Profiling for Alternative Sanctions.

⁸ Level of Service Inventory Revised.

⁹ Public Safety Assessment.

¹⁰ BUNGE, Mario: A General Black Box Theory. *Philosophy of Science*, 30. évf. 4 (1963) 346–258. <https://www.jstor.org/stable/186066> (23.03.2022).

¹¹ BRENNAN, Tim et al: A Response to “Assessment of Evidence on the Quality of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS).” *Northpointe Institute for Public Management, Inc.* 2009. https://www.academia.edu/54493399/A_Response_to_Assessment_of_Evidence_on_the_Quality_of_the_Correctional_Offender_Management_Profiling_for_Alternative_Sanctions_COMPAS (25.01.2022).

personal characteristics of the offender, such as: age, gender, geographical environment, family background, employment or unemployment, economic situation, circle of friends, education, mental state, etc. Among these 137 criteria, five are the most essential¹²: (1) the offender's (deviant) lifestyle, (2) personal relationships/lifestyle, (3) offender's personality, (4) offender's family circumstances, (5) social relationships. In practice, it is used in parole hearings and in the area of sentencing.

COMPAS is the most widely used risk analysis system in the United States; its conclusions are widely acknowledged by experts, and its dependability is undisputed. COMPAS was designed to assist prison officials and probation officers in determining which therapy and re-socialization approaches would be most beneficial for certain offenders. But when employed in sentencing¹³, it can have a detrimental influence on the outcome of plea-bargaining cases since the results of COMPAS frequently encourage judges to contemplate imposing a more severe sentence on the offender than the one agreed upon by the clients during the plea negotiating process.

In 2016, ProPublica published a study on COMPAS¹⁴ and its results, calling the system remarkably unreliable. Programs are developed by humans – which means that just as children can learn the ethnic, religious or gender-based prejudices of their parents or community, these biases can seep into the machines and into their algorithms and data sets. The study described the flaw in the COMPAS system: non-recidivist black defendants received twice the recidivism rate of white defendants. In the case of a repeat offence, white defendants were considered about 50 per cent less likely to re-offend, meaning that when the algorithm thought black defendants were more likely to re-offend (compared to white defendants).

The developer of COMPAS, Northpointe, did not shy away from discussions with ProPublica¹⁵, sensing the fact that there was growing opposition to the scheme, both in jurisprudence and in the legal profession. After the criticism, COMPAS has tried to improve its system by introducing the “fairness criterion.”¹⁶ If an algorithm has been corrected for bias against one group, this does not necessarily mean that it will not fail for other groups.

Some IT experts have also pointed out that¹⁷, although the use of algorithms seems to increase the efficiency of the process and the soundness of decisions, it can raise

¹² FANTOLY-LICHTENSTEIN, 2018. 15–16.

¹³ Practitioner's Guide to COMPAS Core. Northpointe, 2015. <https://s3.documentcloud.org/documents/2840784/Practitioner-s-Guide-to-COMPAS-Core.pdf> (22.01.2022).

¹⁴ ANGWIN, Julia et al: Machine Bias. *ProPublica*, May 23 (2016). <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (13.04.2022).

¹⁵ It should also be noted that after the publication of the study, Northpointe changed its name to Equivant.

¹⁶ FANTOLY-LICHTENSTEIN, 2018. 10.

¹⁷ CORBETT-DAVIES, Sam et al: A computer program used for bail and sentencing decisions was labeled biased against blacks. It's actually not that clear. *The Washington Post*, October 17 (2016) <https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/> (22.02.2022).

serious ethical and scientific problems. Their use should be constantly monitored, and in principle, a critical approach should be adopted to the possibility of these algorithms playing an increasingly significant role in the criminal justice system.

Loomis Case

The Loomis case is the most well-known COMPAS case (2013).¹⁸ The circumstances of the Loomis case in 2013 were Eric Loomis's prosecution for firing from a car and other lesser offenses. Mr. Loomis denied culpability at trial, admitting only that he was driving the car used in the crime considerably later than the time of the crime, but on the same night. During the sentencing process, the Wisconsin probation officer handed to the court a PSI database that was mostly compiled from the COMPAS risk analysis algorithm. Loomis was sentenced to six years' imprisonment and five years of enhanced criminal supervision by the court, taking into account the COMPAS results. Loomis appealed against this decision, arguing that the sentencing based on the COMPAS results violated his right to a fair trial. For instance, COMPAS does not explain how risk scores are established. Due to this lack of openness, defendants are unable to challenge the scientific validity and accuracy of such scores. Second, COMPAS reflects racial and gender prejudices. All else being equal, black men are more likely to be incorrectly projected to reoffend, whereas females are assigned a lower risk score. Third, the system bases its predictions on statistical correlations. Thus, the use of COMPAS by the court violates both the right to a personalized punishment and the right to be punished based on correct facts. The motion highlighted that in using the COMPAS results, the court had unconstitutionally relied on data, some of which allowed for racial discrimination, which was part of the COMPAS question base. Loomis's right to receive an appropriate, individualized sentence was thereby violated. Other grounds included that the sentence was not based on information from a specific knowledge base, as the court was not aware of the algorithm used to impose the sentence.

The Wisconsin Supreme Court judge took the legal position that the ruling was not unlawful. However, the decision emphasizes that the trial court did not consider only the COMPAS results, but also other factors in the sentencing judge's discretion. However, the judge also expressed personal concerns about the COMPAS system.

Expressed Concerns About the Use of COMPAS¹⁹

The system alone cannot be used for decision-making, it can only be one factor in the evidence. To summarise its advantages, it can be most useful where (1) it can be used to prevent a low-risk offender from being sent to a correctional institution; (2) it can be

¹⁸ State v. Loomis, 881 N.W.2d 759 (Wis. 2016)

¹⁹ KEHL, Danielle – GUO, Priscilla – KESSLER, Samuel: *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*. Responsive Communities Initiative. Berkman Klein Centre for Internet & Society, Harvard Law School, 2017, 18-20. https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf (22.04.2022).

a factor in public safety by providing continuous supervision of dangerous offenders, even if this is not carried out in a correctional setting; (3) it can also help in the choice of probation, supervision and treatment models. The court also set age limits for the use of risk analysis systems. While it considers that these methods are undoubtedly useful in revealing the offender's motivation and personal circumstances, they should not be used exclusively to decide the level and duration of a specific sentence; nor should the result of the analysis alone be used as an aggravating or mitigating circumstance in sentencing. The main reason for this is that COMPAS does not consider all the relevant aspects of sentencing, but mostly examines certain factors through the recidivism perspective. Other sentencing circumstances (e.g., culpability, blameworthiness, deterrence) are not reflected in the algorithm. The Court would therefore make it mandatory for the judgment to make clear which aspects of the assessment were based exclusively on the COMPAS results, for example it would also impose a detailed obligation to state reasons in this respect.

Five Warnings from the Court for the Future Users of the COMPAS System

The application of COMPAS would therefore be limited to deciding matters concerning arrests under the Wisconsin Supreme Court's decision. The application of the risk analysis method is precluded from determining whether an offender should be sentenced to imprisonment, nor can it determine the severity of the sentence to be imposed. In addition to the prohibitions on its use, the court also issued five warnings to judges who intend to use the algorithm in the future.

- I. COMPAS is a proprietary tool, which has prevented the disclosure of specific information about the weights of the factors or how risk scores are calculated.
- II. and therefore identify groups with characteristics that make them high-risk offenders, not particular high-risk individuals.
- III. Several studies have suggested the COMPAS algorithm may be biased in how it classifies minority offenders.
- IV. COMPAS compares defendants to a national sample but has not completed a cross-validation study for a Wisconsin population, and tools like this must be constantly monitored and updated for accuracy as populations change.
- V. COMPAS was not originally developed for use at sentencing.²⁰

Judge Abrahamson's Dissenting Opinion

Abrahamson's opinion suggested that the developer of COMPAS, Northpointe, should provide information on the essence of the system's operation. She argued that this would rule out any suggestion that the algorithm takes too much account of the geographic location of the offence (or the offender) or the socio-economic status of the offender. The clarification should cover the following aspects: (1) what data (input factors) the

²⁰ Loomis, 881 N.W.2d 769–770.

algorithm uses; (2) how the algorithm weights each input factor; (3) which of these factors (e.g., race, gender) might be problematic in the evaluation formula.²¹

Algorithmic Accountability Act as a Solution

The Algorithmic Accountability Act of 2022 was introduced in the U.S. Senate as S. 3572²² and in the U.S. House of Representatives as HR 6580²³ on February 3, 2022. The bill proposes to direct the Federal Trade Commission (FTC) to promulgate regulations that require any “covered entity” to perform impact assessments and meet other requirements regarding automated decision-making processes and in particular those that implicate an “augmented critical decision process” – essentially, that result in any legal or other material effects – on a consumer. The Algorithmic Accountability Act would apply to companies that make over \$50 million per year, hold information on at least one million people or devices, or primarily act as data brokers that buy and sell consumer data.²⁴ These companies would have to evaluate a broad range of algorithms – including anything that affects consumers’ legal rights, attempts to predict, and analyze their behavior, involves copious amounts of sensitive data, or “systematically monitors a large, publicly accessible physical place.” That would theoretically cover a huge swath of the tech economy, and if a report turns up major risks of discrimination, privacy problems, or other issues, the company is supposed to address them within a timely manner.

An „augmented critical decision process,” as defined in the bill, is a process, operation, or other activity that employs automated decision systems to make a key choice. In contrast, an „automated decision system” is any system, program, or process (including those generated from machine learning and artificial intelligence approaches) that employs computing and the output of which serves as the foundation for a decision or judgment. The bill includes provisions for a „critical decision,” which is defined as any decision or judgment that has any legal, material, or similarly significant effect on a consumer’s life relating to or the cost, terms, or availability of, among other things, legal services, or any other service, program, or opportunity decisions that have a comparably legal, material, or similarly significant effect on a consumer’s life.

Conclusion

Computers are increasingly being used to make the most crucial choices in Americans’ life, such as whether they can purchase a home, get a job, or even go to jail. However, rather

²¹ Id. 774–75.

²² S.3572 – Algorithmic Accountability Act of 2022. <https://www.congress.gov/bill/117th-congress/senate-bill/3572/text?r=1&s=1> (03.05.2022).

²³ H.R.6580 – Algorithmic Accountability Act of 2022. <https://www.congress.gov/bill/117th-congress/house-bill/6580/text?r=5&s=1> (03.05.2022).

²⁴ L. BRYAN, Kristin – FATH, Kyle R. – TOMIMBANG, Gicel: Federal Lawmakers in House and Senate Introduce Algorithmic Accountability Act of 2022. *The National Law Review*, February 11 (2022) <https://www.natlawreview.com/article/federal-lawmakers-house-and-senate-introduce-algorithmic-accountability-act-2022> (28.04.2022).

than eradicating bias, these algorithms frequently rely on biased assumptions within the data itself, which can actively promote discrimination against women and people of color.

In the 21st century, technology has evolved so rapidly that we initially feared it, but as time went on, we discovered its potential. Based on the information already mentioned, artificial intelligence will inevitably be a part of the future, but it needs to be monitored. The involvement of minorities and indigenous peoples in the planning, implementation and evaluation of these programs could be a solution to the problems between technology and minority groups. Another remedy to these concerns could be to establish clear accountability guidelines for all AI, machine algorithm or other technology-enabled decision making to uphold the rule of law. Most importantly, and something that must be kept in mind for the future, is that technology will not be able to address the underlying social injustices, which will require human beings to solve.

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