NATIONAL REPORT ON AUTOMATION IN DECISION-MAKING IN CIVIL PROCEDURE IN THE CZECH REPUBLIC[1]

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Abstract: The paper focuses on the issue of automated decision-making in civil proceedings. First of all, attention is given to procedural institutes that direct and facilitate automated decision-making, in particular the digital court file and the legal framework of videoconferencing equipment, without focusing on electronic service of documents, which should be a separate paper. A single case of legal regulation of automated decision-making in the form of an electronic payment order is then analyzed (cf. Section 174a of the Code of Civil Procedure). For each of these fields, an analysis of digitalization to date is given, which is followed by a consideration of further developments. It also outlines the limits encountered by the use of modern technologies and the potential risks proposed adjustments.

Keywords: civil procedure; civil proceedings; automation; judicial decision-making; decision; digitization; machines and judges; AI

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1. INTRODUCTION

One of the most significant areas of Civil Procedure is the matter of *automation in decision-making*.[2] This is a consequence of the efforts to simplify the civil proceedings and its certain automation, which is manifested throughout the European countries. A prerequisite for the effectiveness of civil proceedings is the proper setting up of the *digitalization of justice*, which does not only mean that the claimant can file a motion to initiate proceedings by remote access on an electronic form, but also

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[2] Online court proceedings have a significant advantage over offline proceedings: *convenience*. As with an e-ADR, the most obvious benefit of a cybercourt would be its technological capabilities. For example, the use of technology would bring efficiency to the court system. The management of court pleadings and other documents would be streamlined. In addition, the use of technology would assist jurors, attorneys, their respective clients, and witnesses. It would enable *decision-makers* to experience physical evidence in much the same manner as the disputing parties did at the time of the dispute, and lawyers to review information in a cybercase file at any convenient time. Likewise, witnesses could testify without actually going to a physical courtroom. See FANGFEI WANG, F. *Online Dispute Resolution: technology, management and legal practice from an international perspective*. England: Chandos Publishing (Oxford) Limited, 2009, pp. 30–31.

that subsequent judicial acts should be performed in the digital form, including the maintenance of an e-file, the use of videoconference equipment for part or the whole proceedings, and the automation of the judicial decision and its delivery to the litigants (including the action to the defendant in the form of a digital message, or after an automated conversion from paper form) via a public data network.[3] The achievement of this (digital) state of affairs may lead to greater efficiency of civil proceedings, some relief for the courts, and also to faster cooperation between the court and the litigants.[4]

The impact of new technologies on the Civil Procedure can thus be seen in various guises.[5] On a deeper analysis, it is possible to find a specific influence of the advent of modern technology on legal institutes.[6] These include in particular the areas of digital delivery for documents, maintenance of a digital court file, the use of videoconferencing equipment, the recording of the proceedings by digital means, or the sphere of evidence and fact-finding in general, or the possibility of *automated decision-making*.[7] The advent of technology is a major evolution in civil proceedings. However, it does not only bring new opportunities, but also new challenges that will have to be faced in the future. Both in the legal and non-legal aspects.[8]

The aim of this paper is to analyze these levels and answer the question: *Is the current state of the legal regulation of automated decision-making adequate in relation to the technical progress of society in general?*[9]

2. PROCEDURAL MEANS TO SUPPORT AUTOMATED DECISION-MAKING

2.1 COURT FILE IN DIGITAL FORM (E-FILE)

The court file shall be kept on every civil dispute or other legal matter in paper or electronic form [cf. Section 40b(1) of the Code of Civil Procedure[10]]. Currently, there is only one judicial area in which files are available in purely electronic form. That is the *Electronic Payment Order System* (for details see chapter 3 below). It is still expected that the files will be kept partly in paper and partly in electronic form, since all judicial acts (judgments, orders, payment orders, minutes, but also summonses, writs, templates, etc.) are not only part of the paper court file, but are also archived in

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3 Ibid.

4 Ibid.

5 SEDLÁČEK, M. Elektronizace justice a nové technologie v civilním procesu [Digitalization of Justice and New Technologies in Civil Proceedings]. In: SEDLÁČEK, M. – STŘELEČEK, T. et al. *Civilní právo a nové technologie* [Civil Law and New Technologies]. Praha: Wolters Kluwer ČR, 2022, p. 195.

6 Ibid.

7 KATSH, E. – RABINOVICH-EINY, O. *Digital justice: Technology and the Internet of Disputes*. New York: Oxford University Press, 2017, p. 1 et seq.

8 For a more extensive discussion see WING, L. – RAINEY, D. Online Dispute Resolution and the Development of Theory. In: WAHAB, M. – KATSH, E. – RAINEY, D. (eds.). *Online Dispute Resolution: Theory and Practice*. The Hague: Eleven International Publishing, 2012, pp. 19–38.

9 FANGFEI WANG, *c. d.*, pp. 137–147.

10 Act No. 99/1963 Sb., Code of Civil Procedure, as amended.

electronic applications.[11] The procedural norms also do not set out any rules as to where the files must be kept electronically and when it must be kept in paper form, which is a significant shortcoming of the regulations.

The conditions for maintaining the court file are set out in the *Rules of Procedure for District and Regional Courts*.[12] An electronic file may be kept only in an information system specifically designed for that purpose, in accordance with the approved documentation for that information system (cf. Section 26a of the Rules of Procedure for District and Regional Courts). More detailed regulations are also set out in the *Internal and Office Rules for District, Regional and High Courts*.[13] The electronic file administration is implemented in particular for insolvency proceedings, where the insolvency file is maintained in the Insolvency Register – ISIR (cf. Section § 419 of the Insolvency Act[14]). Insolvency files with all proceedings opened since 1 January 2008 can be found in this ISIR. However, a parallel paper file is still maintained.

The electronic file includes court acts in electronic form, which must be accompanied by a recognized electronic signature (or a qualified electronic time stamp), while documents created by the court in written form (e.g., due to the impossibility of creating them directly in electronic form) will be simultaneously converted into the form of an electronic submission (cf. Section 22 et seq. of the Act on Electronic Communications Act[15]). Any filings and other documents from the litigants or other procedural subjects shall also be accompanied by a guaranteed electronic signature or shall be converted into a document contained in a digital message; in the case of submission of a file in written form, the court shall subsequently carry out the authorized conversion into a document contained in a digital message. The court shall then file those documents in the electronic file [cf. Section 25(3) to (5) of the Rules of Procedure for District and Regional Courts].[16]

The current *digitalization* of the court file is not sufficient. There are many documents the nature of which does not allow conversion into electronic form at all.[17] For example, in the case of certain securities, typically promissory notes or bill of exchange. The question of the possible public access to the electronic file, or distance access, also remains a matter of discussion. Even a court file in paper form is not public (cf. Section 44 of the Code of Civil Procedure).[18] Therefore, the only solution seems to be the

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[11] In court applications ISAS, ISVKS, etc. See JIRSA, J. in: JIRSA, J. et al. *Občanské soudní řízení: soudcovský komentář. Kniha I: § 1–250l občanského soudního řádu* [Civil Proceedings: Judicial Commentary. Book I: § 1–250l of the Code of Civil Procedure]. 4th ed. Praha: Wolters Kluwer ČR, 2023, p. 301.

[12] Regulation No. 37/1992 Sb., on Rules of Procedure for District and Regional Courts, as amended.

[13] Ministry of Justice Instruction No. 2/2022 of 9 February 2022, No. 1/2022-OSKJ-MET, amending the Ministry of Justice Instruction of 3 December 2001, No. 505/2001-Org, issuing internal and office rules for district, regional and high courts, published under No. 1/2002 of the Collection of Instructions and Communications, as amended.

[14] Act No. 182/2006 Sb., on Bankruptcy and Settlement (Insolvency Act), as amended.

[15] Act No. 127/2005 Sb., on Electronic Communications and on Amendment of Certain Related Acts (Electronic Communication Act), as amended.

[16] See ŠEBEK, R. in: DRÁPAL, L. – BUREŠ, J. et al. *Občanský soudní řád I. § 1 až 200za: komentář* [Code of Civil Procedure I. § 1 to 200za: Commentary]. Praha: C. H. Beck, 2009, p. 255.

[17] HRDLIČKA, M. in: LAVICKÝ, P. et al. *Moderní civilní proces* [The Modern Civil Procedure]. Brno: Masarykova univerzita, Právnická fakulta, 2014, p. 194.

[18] Ibid., p. 195.

establishment of a distance access to the electronic file.[19] In addition, in the case of a *hybrid file*, a situation may arise where certain parts of the file do not correspond.[20] In such a case, the conflict should be resolved in favor of the paper file. In practice, there are known cases where court files have been stolen or lost outside the court. Even if only an electronic court file will be kept on a given case, it is also necessary to be aware of cases where a litigant or another procedural subject or the court makes (submits) a document only in written form.[21] After the authorized conversion by the court, although the documents will be kept in the *e-file* in electronic form, their original form must also be filed and preserved by the court.[22] Therefore, for these purposes, the courts maintain a collection of written documents – *a (auxiliary) paper file*, which is labelled with the file number of the case before the court.[23]

In the case of an electronic file, it is necessary to be aware of the possible failure of the system that administers the files. This can be solved by a digital system of sufficient quality, properly equipped facilities, both in terms of material and personnel, as well as data backup. *Cybercrime* is a problem, as data stored in electronic files is a natural target for the unauthorized acquisition of valuable information. This data needs to be protected from *cyber-attacks* using new methods. The increase in such attacks on a global basis has been evident for a long time and is likely to grow in the coming years.[24]

2.2 VIDEOCONFERENCE EQUIPMENT AND ITS USABILITY

In several European legal system, *videoconferencing* is already commonly used before the civil court.[25] Foreign experience shows that this (digital) technology has undeniable advantages and allows for more efficient the proceedings.[26] It can be used in particular in the course of taking evidence or making a request, and the procedure for using videoconferencing equipment is regulated by Section 102a of the Code of Civil Procedure.[27] The court may carry out an act using it, especially to arrange for a litigant or an interpreter to be present at a hearing or to question a witness, expert or litigant, at the request of a litigant or if it is expedient to do so [cf. Section 102a(1) of the Civil Procedure Code]. In both cases, the expediency of the use of the digital means will be examined. Only the impracticality of the use should be grounds for rejecting a litigant's request to carry out a procedural act in this way.[28]

Before the start of the videoconference, the judge shall be obliged to advise the person to whom the act relates on the rights and obligations and on the manner of carrying

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19 Ibid.
20 Ibid.
21 ŠEBEK, *c. d.*, p. 255.
22 Ibid.
23 Ibid.
24 Cf. the report on the state of cybersecurity in the Czech Republic in 2023 [online].
25 JIRSA, *c. d.*, p. 654.
26 Ibid.
27 The possibility of using videoconferencing equipment was introduced into civil proceedings with effect from 30 September 2017 by an amendment to the Code of Civil Procedure implemented by Act No. 296/2017 Sb. as a consequence of the continuing trend towards the *digitalization of justice*.
28 JIRSA, *c. d.*, p. 655.

out the act.[29] That person shall also have the right to object to the quality of the video or audio transmission at any time during the proceedings.[30] Two fundamental questions may be asked in this context. Firstly, *do all courts have facilities to enable the use of videoconferencing equipment?* Secondly, *does this equipment allow transmission of sufficient quality?*

The introduction of videoconferencing in the justice sector has been underway since 2017 and currently all courts have equipment that allows them to transmit both audio and visual information.[31] However, the use of this equipment does not depend on the facilities of the courts, but on the discretion of the judge as an expression of their *independent decision-making*. Moreover, the decision not to use videoconferencing is not subject to appeal [cf. Section 202(1)(a) of the Code of Civil Procedure], so it is difficult for a litigant to use the technology if they encounter reluctance on the part of the judge. At the same time, it must be acknowledged that the technical equipment may not be error-free. In some cases, the questioning may be incomprehensible. Therefore, the procedural rules provide the possibility for the person who has proposed the videoconference evidence, or who is concerned by the questioning, to object to the quality.[32] If reliable fact-finding cannot be achieved through the videoconferencing facility, the court is then obliged to conduct the fact-finding of the evidence itself, even if there are increased costs or difficulties in conducting this itself.[33]

The court is always obliged to make an audio and video record when using the videoconference equipment.[34] This also becomes part of the court file (permanent data medium). The taking of a record is still foreseen; however, the record does not have to be signed in addition to the mandatory record. Although participation in the hearing by videoconference equipment may seem advantageous at first sight, especially in terms of time savings and *economy of proceedings*, it also poses certain limitations in terms of direct contact between the litigants and other subjects with the court.[35] The mere fact that a litigant is acting by videoconferencing on the basis of their proposal does not constitute a breach of the *principle of equality of arms*.[36] Nor is it breached if the court fails to inform the litigant that another subject has requested such a special hearing. The use of videoconferencing equipment is thus compatible with *the right to a fair trial*.

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29 Cf. Section 102a(3) of the Code of Civil Procedure.
30 Cf. Section 102a(4) of the Code of Civil Procedure.
31 KORBEL, F. Aktuality. *Soudní rozhledy* [Judicial Reviews]. 2017, No. 5, p. 145.
32 JIRSA, *c. d.*, p. 656.
33 Cf. the judgment of the Supreme Court of 31 January 2019, case No. 21 Cdo 4132/2018.
34 Cf. Section 102a(5) of the Code of Civil Procedure.
35 Cf. the judgment of the Supreme Administrative Court of 23 July 2021, case No. 1 Afs 316/2020-71.
36 The Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly mention equality of arms, however, the European Court of Human Rights has stated in its case law that the principle of "equality of arms" is part of the right to a fair trial – the Delcourt judgment from 1970 states that each litigant to a trial must have an equal opportunity to defend its interests, that no litigant must have a substantial advantage over the opposing litigant and that each litigant must be able to present its arguments on terms which are not clearly disadvantageous in comparison with the opposing litigant. See KMEC, J. – KOSAŘ, D. – KRATOCHVÍL, J. – BOBEK, M. *Evropská úmluva o lidských právech: komentář* [European Convention on Human Rights: Commentary]. Praha: C. H. Beck, 2012, pp. 737–740.

However, it must be ensured that the hearing is monitored, and the questioning is free from technical obstacles.[37]

Videoconference is by its nature a direct visual and audio transmission. However, it is not always possible to use such equipment. These are *limitations* which are determined by the specific circumstances of the case. An example is the conduct of an examination pursuant to Section 130 of the Code of Civil Procedure, which constitutes a direct means of evidence consisting of the judge's own perception of the facts relevant to the decision.[38] This makes the examination one of the most reliable means of proof. It is conceivable that it can also be conveyed by the transmission of images and sound. In some cases, however, this will be impossible.[39] Even if it were a fact that could be ascertained from a photograph, for example, there might be some distortion due to technology.[40] This is not necessarily due to the subsequent editing of the photograph or the video, but perhaps also to the taking of the footage from specific angles.[41] Therefore, the videoconference equipment has its *limits*.[42] The court is not obliged to warn the litigants of the possibility of using it. Its use is therefore at the discretion of the court, either at the request of a litigant or where it is appropriate to do so.

3. AUTOMATED DECISION-MAKING – ELECTRONIC PAYMENT ORDER

The implementation of the *Electronic payment order* on the Civil Procedure Code in 2008 represents the first step towards the *automation of decision-making*.[43] Since 1 January 2012, the central electronic payment order application (CEPR) has been in operation, with the previous methods of processing applications for its issuance having been terminated.[44] All this judicial agenda is now kept only in the *digital form*, with the exception of the so-called "collection file", in which submissions received in paper form are entered after they have been converted and included in the electronic file (cf. Section 40b of the Code of Civil Procedure).[45] Through the special application *InfoDokument*, available on the website of the Ministry of Justice of the Czech Republic, the litigants may verify the authenticity of the court decision, and in the case of an

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37 Cf. judgment of the European Court of Human Rights No. 45106/04 of 5 October 2006 in the case of *Marcello Viola v. Italy*.

38 LAVICKÝ, P. in: LAVICKÝ, P. et al. *Občanský soudní řád (§ 1 až 150l): řízení sporné: praktický komentář* [Code of Civil Procedure (Sections 1 to 150l): Contentious Proceedings: Practical Commentary]. Praha: Wolters Kluwer ČR, 2016, p. 641.

39 Ibid.

40 Ibid., p. 642.

41 Ibid., p. 643.

42 LOUTOCKÝ, P. *Vymahatelnost práva pomocí online řešení sporů* [Law Enforcement through Online Dispute Resolution]. Praha: Wolters Kluwer ČR, 2020, p. 62 et seq.

43 The Electronic Payment Order was introduced into civil proceedings with effect from 1 July 2008 by an amendment to the Code of Civil Procedure implemented by Act No. 123/2008 Sb.

44 SVOBODA, K. *Řízení v prvním stupni: civilní proces z pohledu účastníka* [Proceedings at First Instance: Civil Procedure from the Perspective of a Litigant]. Praha: C. H. Beck, 2019, p. 397.

45 JIRSA, *c. d.*, p. 1107.

electronic payment order, it is possible to obtain the electronic original of the order, including the marked legal force clause.[46]

The issuance of an electronic payment order is a specific variant of the order procedure, which is governed by the same rules as the general order proceedings (cf. Sections 172 to 174 of the Code of Civil Procedure), unless otherwise expressly provided for in Section 174a of the Code of Civil Procedure. It may be issued only if:
(1) the claim is for the payment of a sum of money not exceeding CZK 1,000,000,
(2) the right claimed arises from the facts stated in the motion,[47]
(3) the motion is submitted electronically on the prescribed form,[48]
(4) the motion bears the electronic signature of the claimant,[49] and
(5) the issue is expressly requested.[50]

The motion shall be filed through the central *eFiling Office* (www.epodatelna.justice.cz) using the electronic form available in the relevant section in its up-to-date form, including instructions for completion and filing. In addition to the general requirements [cf. Section 42(4) of the Code of Civil Procedure] and the requirements under Section 79(1) of the Code of Civil Procedure, the motion must also include the date of birth of the natural person, the identification number of the legal entity or the identification number of the natural person who is an entrepreneur.[51] These data are used for the automatic verification of persons, the absence of which is grounds for rejection of the motion.[52] The condition for the issue of an electronic payment order is also that the asserted right arises from the facts stated by the claimant, which presupposes a recital of the relevant facts in such a way as to enable the court to subject the factual basis asserted by the claimant to a legal assessment and to conclude that the substantive right gives rise to the claimant's asserted claim to the full extent.[53] The motion is accompanied by scanned documentary evidence, which need not be signed in any way and are thus copies.[54] If the proceedings are terminated by a final electronic payment order, the court shall not require the production of original or certified copies of the evidence.[55] These could be required if the case is transferred to the regular proceedings (to the first instance civil docket under "C") due to the non-issuance or revocation of an electronic payment order already issued.[56]

If the motion does not contain all the statutory requirements, if it is incomprehensible or if it is vague, the judge shall reject it if the proceedings cannot be continued due to these deficiencies; the procedure under Section 43 of the Code of Civil Procedure shall

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46 SVOBODA, *c. d.*, p. 397.
47 ZAHRADNÍKOVÁ, R. et al. *Civilní právo procesní* [Civil Procedural Law]. 3rd ed. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2018, p. 210.
48 Ibid.
49 Cf. A recognized electronic signature means a guaranteed electronic signature based on a qualified certificate for electronic signature or a qualified electronic signature.
50 SEDLÁČEK, *c. d.*, p. 196.
51 Cf. Section 174a(2) of the Code of Civil Procedure.
52 JIRSA, *c. d.*, p. 1107.
53 ŠEBEK, *c. d.*, p. 1166.
54 JIRSA, *c. d.*, p. 1107.
55 Ibid.
56 Ibid.

not apply.[57] It is not possible to remedy the defects in the motion by means of an invitation under that provision, since that would defeat the purpose of the expedited procedure. An appeal is admissible against the order rejecting the application (cf. Section 202 of the Code of Civil Procedure *a contrario*). Since that decision does not constitute an obstacle to *rei iudicatae*, the claimant may re-submit the motion with all the requisites. An electronic payment order cannot be issued if:

(1) the residence of the defendant is unknown,
(2) the order for payment issued should be served on the defendant abroad,
(3) the defendant is a minor who has not yet acquired full capacity on the date of the commencement of the proceedings or on the date of the intervention,
(4) the value of the claim asserted in the motion exceeds CZK 1,000,000,
(5) the court continues the proceedings after the proceedings have been stayed, or
(6) the court fee has not been paid within the time limit set by the court.[58]

In court practice, there is a consensus of opinion that no consideration is given to the value of the claim (cf. Section 513 of the Civil Code).[59] This means that the amount of the accessories claimed together with the main amount of the claim has no bearing on the determination of the admissibility of the issue of an electronic payment order, even if they alone or together with the claim itself (the principal) exceed CZK 1,000,000.[60] If, however, the claimant was to request payment only of the accessories to the claim (interest, default interest, costs associated with their application) for an unspecified period of time (until payment of the outstanding principal), it cannot be concluded that the requested payment would not exceed CZK 1,000,000; the issue of an electronic payment order is then excluded.[61]

A statement of *protest* against an electronic payment order may also be filed on an electronic form signed with a certified electronic signature [cf. Section 174a(6) of the Code of Civil Procedure]. However, the protest may also be lodged outside the system of CEPR, so the defendant has a choice whether or not to lodge it using an electronic form. By filing a statement of protest, the payment order is cancelled, and the proceedings are transferred to the (standard) adversarial procedure. The further course of the proceedings depends on the specific circumstances of the case. As in the case of the revocation of the order for payment, the court shall order a hearing in the case [cf. Section 174(2) of the Code of Civil Procedure]. However, even in the case of electronic payment orders, the courts make use of the possibility of inviting the defendant to make a statement on the claim asserted in the action pursuant to Section 114b of the Code of Civil Procedure or, if the litigants agree, to decide the case without a hearing pursuant to Section 115a of the Code of Civil Procedure. The response to these requests will be followed in the proceedings.[62]

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[57] Cf. the decision of the Supreme Court of 15 October 2002, Case No. 21 Cdo 370/2002.
[58] SEDLÁČEK, *c. d.*, pp. 197–198.
[59] Act No. 89/2012 Sb., Civil Code, as amended.
[60] ŠEBEK, *c. d.*, p. 1166.
[61] Ibid.
[62] HAMUĽAKOVÁ, K. in: ŠÍNOVÁ, R. – HAMUĽAKOVÁ, K. et al. *Civilní proces: obecná část a sporné řízení* [Civil Procedure: General and Adversarial Proceedings]. 2nd ed. Praha: C. H. Beck, 2020, pp. 249–250.

One of the *motivations* for using the electronic payment order is the reduced rate of the court fee for filing a motion for its issuance (cf. item 2 of the Fee Schedule of the Court Fees Act).[63] While the minimum court fee for a regular order for payment is CZK 1,000, the minimum fee for an electronic payment order is CZK 400. In principle, the court fee for an application for an electronic payment order is 4 per cent of the claim, as opposed to 5 per cent if the same application is made by way of an action or an application for a general payment order. This advantage is intended to reflect the lower cost of processing the CEPR by the court. If the court does not issue an electronic payment order, a court fee may be charged up to the amount set for a regular application for initiation of proceedings. However, the transfer of the CEPR to judicial agenda "C" must be exceptional, even though a purely linguistic interpretation of Section 174a(1) of the Code of Civil Procedure makes it clear that *"the court may issue an electronic order for payment at the request of the applicant"*.[64]

4. LIMITS, RISKS AND STRAIGHTFORWARD CHALLENGE OF AUTOMATED DECISION-MAKING

The superficially straightforward challenge, "can machines replace human judges?" conceals at least five questions.[65] The first is whether it is *technically possible* for machines to replace judges.[66] The second asks, even if it were technologically possible, would it be *morally acceptable* for machines to take on any judicial functions?[67] The third inquires whether such systems would be *commercially viable*, that is, would their economic benefits outweigh their costs?[68] Fourth, would this be *culturally sustainable* – could such systems be assimilated without rejection into court institutions dominated by age-old procedures with human judges at their core?[69] Finally, there is a philosophical question, is it *jurisprudentially coherent* to develop such system?[70] Is there anything specific about the structure and nature of judicial decision-making itself that places it, partly or entirely, beyond the scope of computation?[71]

However, we do not currently encounter fully automated decision-making. Thus, apart from the possibility of issuing an electronic payment order (cf. Chapter 3), there is still a decision to be made that requires the action of a natural person and there is no system in place to make to completely replace the judge's decision-making process. In recent years, the only effort to be seen has been the creation of a CTD information system, i.e., *Central Document Production*. Although the term might seem to imply

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63 Act No. 549/1991 Sb., on Court Fees, as amended.
64 JIRSA, *c. d.*, p. 1108.
65 SUSSKIND, R. *Online Court and the Future of Justice*. New York: Oxford University Press, 2019, p. 278.
66 Ibid.
67 Ibid.
68 Ibid., p. 279.
69 Ibid.
70 Ibid.
71 Ibid.

that it is a step towards automated decision-making, it is only a tool for the creation and management of templates, with the aim of unifying document creation.

The fundamental question greater to the introduction of automated decision-making is whether machines can take on the work of judges. According to my opinion, the central work of judges is "the creativity, craftsmanship, individuality, innovation, inspiration, intuition, common-sense". If we will follow this line of thoughts, we can probably come to the following mistake: (1) judges think when they are doing their work, (2) machines cannot think, and so (3) machines cannot do the work of judges.[72] *"In the context of AI, this inclines us to consider whether machines can deliver decisions at the standard of human judges or higher, not by replicating the way that judges think and reason but by using their own distinctive capabilities (brute processing power, vast amount of data, remarkable algorithms)."*[73] In view of the above, there are three major technical question here. The first one is, *can a machine think, work, emote, create, reason, and feel like a human judge?* The answer is "no". Only a human being can function as a human judge does. The second one is, *whether the outcome of the judicial method – very crudely, decisions with reasons – can delivered by machines? "In this era of increasingly capable machines, then, it is not outrageous to expect at some stage, whether 20 or 100 years from now, that systems will outperform judges at their own game, delivering reasoned judgments with explanations that will look and feel like the finest of human judgments but sourced through AI rather than judicial 'wetware'."*[74] The third question is, *whether it is possible to develop systems that deliver the social and economic outcomes we expect of judges and courts but do so in unhuman ways?*[75] The answer would be more positive and takes us back to machine learning and the prediction of court decisions.

Of course, decisions of the courts have only been made by judges in the past. But does this bind us for all time? Probably not. Litigants may not want judicial decision; on one view, the want a binding decision by an institution we call a *court*.[76] *"In principle, we can imagine a machine generating findings that, by law, are deemed authoritative. It could be enshrined in the rules of court, for instance, that if the system predicts a court finding in favor of the claimant with a probability factor greater than, say, 95 per cent, then that finding becomes the official determination of the court."*[77] This may be thought to be undesirable or unlikely, but it is certainly a possibility.[78] As ever then, we need to keep an open mind, remembering too that the high ground is not necessarily held by those who prefer the *status quo*.

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72 Ibid.
73 Ibid., p. 280.
74 Ibid., p. 281.
75 Ibid.
76 Cf. *"No one shall be deprived of his lawful judge. Jurisdiction of the court and the judge shall be determined by law."* (Article 38(1) of Constitutional Act No. 2/1993 Sb., Charter of Fundamental Rights and Freedoms, as amended).
77 SUSSKIND, *c. d.*, p. 287.
78 Ibid.

5. CONCLUSION

Procedural rules should naturally respond to new technologies and techniques that affect aspects of the daily lives of individuals.[79] It will be necessary to continue to identify the areas of civil procedure that are most affected by technological progress and to continue the trend towards the digitalization of justice and the automation of judicial decisions.[80] To be content with the maintenance of a *digital court file*, *the electronic service of documents*, *the use of videoconferencing equipment* or the possibility to decide in summary proceedings by *electronic payment order* would be to rest on one's laurels. If technology enables easy remote connection and transmission (audio and video), the possibilities offered should be fully exploited in court proceedings.[81] Of course, this is subject to the *guarantee of the right to a fair trial* and *its fundamental principles* (cf. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

I conclude that probably there will be little difference between traditional and automated decision-making in coming years. Automated decision-making is being designed and developed precisely to overcome the disproportionate expense and efforts of traditional decision-making techniques. If their promise is fulfilled, and the early cases give us strong reason to be optimistic, then the social good that is *effective dispute resolution* will be much more widely distributed across civil proceedings. And this good will be accessible at a cost, within timescales, and in a spirit that is notably more proportionate to the value of every dispute than the machinery of conventional decision-making.

The answer to the question I posed in the Introduction (cf. Chapter 1) is surely very clear – the current state of the legal regulation of automated decision-making *is not adequate* in relation to the technical progress of society in general. *In its conservatism, today's generation runs the risk of being guilty of sins of omission, of failure to make changes*.

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79 SEDLÁČEK, *c. d.*, p. 205.

80 Digital justice must enhance both "access" and "justice" through the use of technology. Access is enhanced through the wide availability of online redress and prevention mechanisms, as well as by algorithms that can handle large numbers of disputes and employ easy-to-use, plain language, and tailored processes. Justice can be enhanced where algorithms impact parties in an even-handed manner and are subject to quality control. Dispute data aimed at dispute prevention is a recent development and needs to be used fairly, targeting problems related to a variety of stakeholders, while respecting individual privacy and legal restrictions on use of private information. To be effective, digital justice will require extensive monitoring of the impact of design choices on both efficiency and fairness. This is no simple task. Despite challenges, however, this new dispute resolution and prevention landscape holds the promise of many important improvements, including our basic understanding of how justice works. No longer will it be dependent on a physical, face-to face environment, or even subject to the limitations of human decision-making. See KATSH – RABINOVICH-EINY, *c. d.*, p. 180.

81 SUSSKIND, *c. d.*, p. 293 et seq.