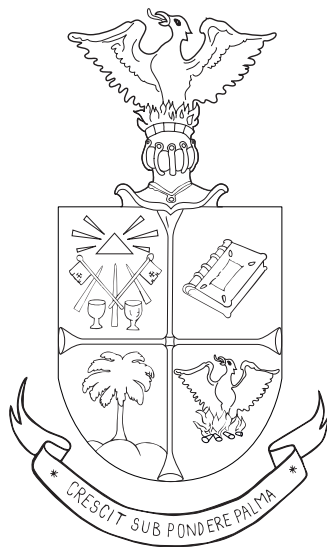


## **Karoli Mundus II.**



# KAROLI MUNDUS II.

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## IN THE WEB OF TECHNOLOGY - THE PRESENT AND POSSIBLE FUTURE OF PRIVATE ENFORCEMENT

### Introduction

Societal expectations of justice vary in space and time. Yet, looking back over the history of mankind, several constants emerge that have almost always been present in the way courts operate: to reach a just (i.e. not arbitrary) decision, preferably as soon as possible. It is precisely the latter, the time factor, which evolves with social and economic changes. Perhaps one of the best-known and most striking examples of the concept of time is that of the medieval cathedral builders, who began their work in the knowledge that they would never see the end of it, the finished work. From then on, one of the common effects of change is a shrinking sense of time.<sup>2</sup> As the time spent travelling, producing goods and getting communication to its destination becomes shorter and shorter thanks to each invention, the members of society become increasingly impatient.

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

The state (the branches, subsystems and service providers that carry out state functions) must recognize these changes, understand the reasons for them and respond accordingly. This is also the case with the judiciary, perhaps the most complex and specific of all state functions, and the initial question to be asked in this context is: what are the most important social and economic expectations of the judiciary in the first half of the 21st century, what should be preserved from the organisational

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

and procedural principles that have been established over the past centuries, and how can its service character be enhanced?

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

## **I. The present of private enforcement**

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

### **1. Judicial and procedural principles have become dogma**

These principles are contained and safeguarded by norms at the highest level of the legal hierarchy: international conventions, constitutions and procedural laws. Thanks to the practice of regional courts and national constitutional courts, respect for these principles is so deeply rooted in legal thinking that the first question to be asked in the event of any change of organizational or procedural model, or even of any amendment to legislation, is whether the new provision is compatible with and can be integrated into this system of principles and frameworks.<sup>3</sup> There is a

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

lack of analyses of the systemic functioning of the judiciary that approach possible new procedural and organisational changes from the ‘user’s side’, looking at how they serve the interests of legal entities and how much more ‘attractive’ it will be for them to use the judicial route.

## **2. The courts are cumbersome and time-consuming**

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

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

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

## **3. New competitors in the justice market**

There is a clear tendency for large service providers and e-commerce companies to seek to provide efficient and quick solutions to disputes related to their services, primarily through dispute resolution procedures on their own platforms. These include E-bay and Alibaba. These providers have quickly recognized that offering a

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fundamental principle environment, see e.g. Anne Paschke, *Digitale Gerichtsöffentlichkeit - Informationstechnische Maßnahmen, rechtliche Grenzen und gesellschaftliche Aspekte der Öffentlichkeitsgewähr in der Justiz*. Duncker & Humblot, 2018, Berlin.

fast and efficient solution to disputes over contracts on their websites can increase the number of visitors to their websites and the number of users of their services.<sup>4</sup> They were also helped by the fact that all the data on the contract was available and retrievable on the platform: when the contract was concluded, with what content, between whom, so that the parties did not have to spend time gathering evidence. One of the lessons learned from the development of the E-bay platform was that the first version was simplified years later in an update to reduce the number of questions and data that parties had to answer in order to start the procedure. This simplification has led to a surge in the number of claims, suggesting that the simpler the means of accessing an enforcement procedure, the more attractive and accessible it becomes to more parties.<sup>5</sup>

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

#### **4. Diverging roles and interests between the legal professions and between the various actors in the process**

The current model of civil litigation is, in a very simplified way, as follows: the judge's task is to decide the dispute, the legal representative (lawyer)'s task is everything else: to fill in the party's lack of legal knowledge, to think through the possible outcome of the case, to consider the tactics, to collect and submit evidence, etc. In the litigation process, the judge also has different tasks in relation to the representation, which in the models of different countries varies from passive to active. Everywhere, the judge has a duty and a legal obligation to conclude the case within a reasonable time. It is interesting to note that there is no such requirement in relation to legal representation, at most a similar obligation can be derived from the requirement of good faith. The remuneration of the lawyer also works against a speedy conclusion, a connection which is also rich in legal literature.<sup>6</sup>

#### **5. Difficult to plan duration, difficult to predict substantive decision**

It is generally accepted in the field of criminal science that the greatest deterrent to committing/repeating a crime is exposure - the greater the proportion of offenders

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4 Ethan Katsh - Orna Rabinovich-Einy: *Digital Justice*. Oxford University Press, 2017, New York; pp. 155-157 - hereafter Katsh-Rabinovich

5 Katsh-Rabinovich p. 160.

6 Gergely Czoboly: The protraction of civil lawsuits. In: András Jakab - György Gajdushek (eds.) *The state of the Hungarian legal system*. Hungarian Academy of Sciences Research Centre for Social Sciences, 2016, Budapest; pp. 758-776.

who fear being convicted, the more they will consider whether it is worth the risk. The same applies to temporality: the closer in time the offence and the punishment are, the greater the deterrent effect of the latter.

The situation is similar in civil disputes, especially in property disputes, where the debtor knowingly and willingly does not pay, but is only interested in stalling and in the disappearance of his assets on which the enforcement is based. If the civil proceedings are concluded as close as possible to the date of the debt's expiry, in a predictable manner and with a predictable outcome, this will at least force the debtor to reach an agreement. The timeliness and duration of civil proceedings is also of paramount importance, and is directly proportional to the effectiveness of enforcement.<sup>7</sup>

The lack of uniform, predictable case law on a particular legal issue may also act as a deterrent to resorting to the courts. The development and implementation of uniform case law, which is a cornerstone of legal certainty, is a task typically for national supreme courts, which have different means and methods for achieving this. What they have in common is that, as time goes on, more and more previous decisions and guidelines have to be kept in mind, their coherence maintained or revised because of changes in the law. In countries where precedent or quasi-precedent exists, it is a task beyond human capacity to cull the relevant judgments from tens of thousands of decisions, without precise methodology and technical assistance.

## **6. Lawsuit on paper**

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

## **II. The possible future of private enforcement**

Thinking about the future does not necessarily mean thinking about the difficult-to-predict distant future. Indeed, information technology, at its current stage of development, already offers solutions that could provide realistic help in overcoming or at least alleviating the difficulties outlined in the previous chapter. Although it is

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<sup>7</sup> For a scholarly analysis of the temporality of civil proceedings, see László Gáspárdy, *The time dimension of civil proceedings*. Akadémiai Kiadó, 1989, Budapest.



difficult to schedule each individual development - its implementation and realisation depend on many factors - the following proposals could be implemented within this decade if there is professional consensus and political will. In other words, this chapter seeks to give a sense of what justice could look like in 2030 with the help of information technology.

### **1. Information technology is not the solution for every type of problem or case**

At the outset of the consideration of each proposal, it should be noted that the IT solutions known today are not a solution for every type of problem or case. The key to digitalisation is automation, i.e. information technology can only be used for cases and legal issues that can be well typified. It is worth noting here that in the case of so-called complex disputes, there is a greater willingness on the part of the parties to settle, for which there are already several well-known and well-established platforms (Cybersettle, Inter-Settle, e-Settle, Click N'Settle, etc.).<sup>8</sup> The human factor, the human judge, will therefore not disappear from civil litigation (certainly not until 2030), but his or her role and the knowledge required will change. However, this change is not radical, as the judge's role is already to transmit information during the trial. The parties provide information to the judge, which is transformed into a trial and the end of the proceedings (judgment) and an information. Judges have to learn how to structure this information into data that IT can evaluate.

### **2. Data-based lawsuit**

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

### **3. Using blockchain technology**

The evidence phase is a central part of litigation. The availability of evidence, its transparency and the examination of its origin are of decisive importance. At present,

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8 Graham Ross: What's Good for ODR? AI or AI. In: International Journal on Online Dispute Resolution 2021/1. pp. 21-22.

in the era of paper-based litigation, the question of how parties can present evidence and prove facts to the court months later in disputes where every element of the legal relationship has been conducted online is still unresolved. This can be helped by blockchain technology, which works through pre-written, immutable, tamper-proof software, where information (evidence) is downloaded to computers (legal representatives, court) operating on nodes in distributed networks. When a change is made to the database, it is checked by software running on all the computers in the network and then updated. This method excludes the possibility of evidence tampering.<sup>9</sup>

#### **4. Court platform - all in one place**

Perhaps the most visible, but certainly substantial, change from current enforcement would be for the parties to have a well-designed, easy-to-use and transparent platform to get answers to all their relevant questions and information, and for the parties to a dispute to be able to contact each other through that platform. Such platforms already exist in a number of countries and the experience has been positive. In the United States of America, researchers at the University of Michigan developed an online service called Matterhorn, which was first launched in 2017 in a Michigan district court and is now operating in more than 40 courts in 8 different states. The system was originally designed to help courts and citizens communicate more effectively with each other. It is available 24 hours a day via smartphone and is primarily used for small claims and family law disputes. The parties receive the court's decision through this platform. Another online court was launched in 2018 in Utah for disputes under \$11,000. Through this platform, parties can attempt to reach a settlement without the involvement of the court or with the help of a case manager who will answer their basic legal questions and mediate to reach a settlement. The administrator will also assist in the submission of the necessary documents following an unsuccessful settlement attempt. If the parties so request, the administrator may decide without a hearing, on the basis of the documents submitted, or refer the case to a judge, who may order a hearing of the parties.<sup>10</sup>

According to Susskind, the best known and most advanced online dispute resolution system is currently in British Columbia, Canada, called the Civil Resolution Tribunal. Launched in mid-2016, the service is available for property disputes up to \$5,000, and from 2019 it will be available for claims involving traffic accidents up to \$50,000. There are four parts to the service. The first will help users understand

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9 Nelson M. Rosario: Introduction to Blockchain and Cryptography. In: Katz - Dolin - Bommarito (eds.): Legal Informatics, Cambridge University Press, 2021, Cambridge, pp. 114-119.

10 Richard Susskind: Online Courts and the Future of Justice, Oxford University Press, 2019, Oxford, pp. 174-176 - hereafter: Susskind

their legal situation, the second will seek to create an informal settlement between the parties. If this fails, an administrator steps in in the third part and tries to get the parties to reach an agreement. Finally, if this is unsuccessful, a member of the civil arbitration tribunal (who is not a judge) will issue a decision.<sup>11</sup>

It is important that this is not just an information site with templates describing different options, but an intelligent and secure site where the parties can get a personalised response to their specific problem. It should also be ensured that settlements reached through this platform have the same two key features of the decision ending the procedure, i.e. a judgment and enforceability. It is clear from the examples mentioned that human involvement is essential in these platforms: court administrators or judges can be involved at a stage where this may be justified. The development of such a platform would also bring about an important change of mindset, from courts waiting for parties to enter their premises to opening their doors and allowing anyone to deal with their court case from home using a smart device. It is also important to stress that this is unlikely to trigger a new influx of cases already in the courts, but rather new disputes that have so far been out of the courts' reach would be brought and resolved through the platforms, creating a new type of caseload for the courts.

It is worth noting that the design of such platforms is the subject of an almost independent research direction, legal design: thinking about and analysing how to create simpler, more efficient and smarter interfaces for non-legal users, which will not discourage them from using the platform, but will endear them to the legal subjects.<sup>12</sup>

## **5. The effective exercise and extension of the right to justice**

It is almost an axiom in the legal literature that the use of technology helps to ensure the right to justice.<sup>13</sup> This seems to be true even as other sources in the legal literature warn that any innovative solution must be guaranteed to be accessible to generations less open to information technology and to societies where internet-based services themselves are not yet as widespread or as developed.<sup>14</sup>

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11 Susskind pp. 168-169.

12 Among the publications on legal design, Amsler - Martinez - Smith (eds.) *Dispute System Design: Preventing, Managing and Resolving Conflict*, Stanford University Press, 2020, Stanford.

13 Daniel Rainey - Larry Bridgesmith: Bits and Bytes and Apps - Oh My! Scary Things in the ODR Forest. In: *International Journal on Online Dispute Resolution* 2021/1. p. 6 - hereafter referred to as Rainey - Bridgesmith

14 Dory Reiling: Courts and Artificial Intelligence. In *International Journal for Court Administration* 2020/2. art. 8, pp. 7-8.

At the same time, the meaning of the right to justice is necessarily expanding, precisely because of changing social and economic expectations: this fundamental right no longer means only the right to a judicial decision, but also the right to fair administration, problem solving and information. Still others distinguish between five components of the right to justice in dispute resolution using information technology tools in the online space: diagnosis, negotiation, mediation, interpretation of the law, decision.<sup>15</sup>

## 6. Using artificial intelligence

Artificial intelligence is the holy grail of information technology, and the expectations are much higher than what it can do now and in the near future. What it does well at the moment is that it can process much more data much faster than a human, and it never gets tired, its work is continuous. Artificial intelligence finds patterns and repetitions in the data series, a property that is also used for so-called predictive programs. It is also worth noting that the greatest development and competition in the field of artificial intelligence is currently not in law, but rather in the much more profitable fields of pharmaceutical, medical and military research. Even here, however, these programmes have not yet reached the level of general artificial intelligence, i.e. they do not yet have all the capabilities that the human brain has. It<sup>16</sup> follows that in the field of justice, artificial intelligence is unlikely to replace human intelligence in the foreseeable future. It is therefore worth concentrating on the areas where it can make a meaningful contribution to the work of the judiciary.<sup>17</sup>

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

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15 For a summary of the different ideas, see Rainey - Bridgesmith p. 7.

16 György Tiesch - Omar Hatamleh: Art and Intelligence. Libri, 2021, Budapest; p. 19.

17 The following division is given by Daniel Martin Katz: AI + Law - An Overview. In: Katz - Dolin - Bommarito (eds.): Legal Informatics, Cambridge University Press, 2021, Cambridge, pp. 90-93.

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

Following the programme's enthusiastic reception, COMPAS has come in for increasing criticism. The most common of these is a problem known as the "black box": the developer treats the exact specification of the software as a trade secret, so that prosecutors have virtually no control over its operation. The software was designed to eliminate subjectivity and human error, but now the automated decision that replaces it is the focus of controversy. So far, the Wisconsin Supreme Court has addressed these issues in the most detailed way, in its 2016 ruling in *State v. Loomis* (the federal Supreme Court has yet to rule on this). The facts of the case were not extraordinary: Eric Loomis was charged with five felonies in connection with a car chase, two of which he pleaded guilty to and entered into a plea bargain. The court of first instance used the COMPAS analysis to determine the sentence, which showed that the risk of re-offending was very high, and that the defendant posed a high risk to society. The court therefore imposed a maximum sentence of six years' imprisonment for the two offences.

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

### **III. Summary**

Public justice in developed countries is at a crossroads: either it adapts to the challenges of the digital revolution and becomes attractive and realistic, winning the competition against the online dispute resolution platforms of the big private providers, or it is relegated to the reservoir of legal history. The challenge is complicated by the fact that there is no end to the development of information technology, which means that some solutions could easily become technologically obsolete after 5-10 years. It is particularly difficult for lawyers who are attached to principles and predictability to accept that the model of law enforcement, which has been in place for almost 200 years, needs to be fundamentally rethought and that courts need to be allowed to innovate. Dogmas have to be rewritten, new issues and technological concepts that go beyond law have to be introduced and familiarised at user level. It is also safe to say that the country the lawyers and legislators of which are the first to recognise all this and are able to provide the right answers will have a serious competitive advantage over other countries, given that an efficient and predictable judicial system is an important prerequisite for the functioning of the economy and for social peace.