CHANGING THE SYSTEM OF PRINCIPLES OF CIVIL PROCEDURE IN THE CONTEXT OF DIGITALIZATION

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Abstract *– The purpose of this article is to analyze the changes in the system of principles of civil procedure, significant changes of which occurred after the COVID-19 pandemic. The study was conducted on the example of the US civil procedure. Even after the pandemic, when the use of technology has become widely encouraged around the world, courts are faced with the problem of how to conduct proceedings according to the new standards. From this point of view, this article also aims to consider the future prospects and challenges facing the courts in the era of post-pandemic and new technologies.*

Keywords*: principles of civil procedure; online dispute resolution, ethical principles, artificial intelligence*

INTRODUCTION

During the COVID-19 pandemic, many courts in foreign countries had to suspend court proceedings. Thus, the number of unresolved cases steadily increased, and the courts had to change the format of traditional court proceedings, transferring a number of functions to online mode.

But even after the pandemic, the use of digital technologies in courts has not decreased, and is likely to continue and even expand. The rapid spread of the use of technology in the courts has led to the need to develop new principles of judicial procedure to combat the risks and adverse consequences of the spread of these technologies.

In the United States, electronic filing for litigation was available in many states and cities even before the pandemic. And since March 2020, when the first wave of the pandemic hit the country, similar processes have spread to 10 more states.

In addition, even before the pandemic, various online dispute resolution programs (hereinafter referred to as OUS) were launched in US state courts, many of which related to such types of cases as: traffic violations, non-payment of debts, small claims and family relations [15]. These areas of dispute have been prioritized for the use of the OUS program due to the frequent cases where one or both parties are not represented by a lawyer.

According to estimates, the OUS is more attractive to the parties, as it requires less time and increases user satisfaction compared to traditional litigation [16]. According to a survey published by the National Center for State Courts in 2018, the vast majority of young people prefer OUS over traditional proceedings.

Thus, 66% of participants with experience in traditional litigation will use the OUS program, and in the case of road disputes, 74% of participants under the age of 50 (59% for over 50) prefer to use the OUS instead of the traditional court. In consumer and credit debt cases, the ratio was 58% for people under 50 and 45% for people over 50, and in small claims cases it was 53% for people under 50 and 38% for people over 50 [20]. The reason for the popularity and expansion of the use of the OUS program is the ease of understanding online processes and the ease of using online services. This

program reduces the workload of the courts, since the OUS allows the court to focus on cases that require the intervention of judges. The implementation of OUS leads to significant results.

So, in the Los Angeles Supreme Court in the first two weeks of the program, about 1,000 cases were registered for OUS, and as of August 2021, about 300 small claims cases were resolved through the OUS platform without the need to appear in court at all [11]. Although this number represents approximately 0.5% of the total number of small claims filed in one calendar year, an increase in the number of users of this platform and an increase in the number of resolved cases through the OUS program is expected [11]. In the United States, since the first pre-trial OUS system was launched in 2014, courts have continued to expand its scope, and the pandemic has increased the number of courts using OUS. From 2020 to April 2021, 23 more ship-sponsored OUS systems were launched [11]. For example, in the courts of the state of Michigan, the MI-resolve system is provided online, through which people can participate in mediation using the chat function. Mediators here are persons who have been trained in court, and sometimes lawyers who mediate on a voluntary basis [12]. Users can use the OUS system for dispute resolution for free if they know the email address of the second party to the proceedings.

In California, the Los Angeles Supreme Court was one of the first courts to use the OUS for small claims, and further expanded the scope of this program to resolve disputes related to child custody and cases of lockdown violations during the pandemic [11]. New OUS systems are currently being tested, such as the landlord tenant HUB court in Erie County, New York. This is the first virtual court in New York State that provides various legal services. Since the launch of the pilot program in December 2021 to June 2022, more than 900 cases have been reviewed [5].

In general, the implementation of OUS in the USA is successful, but a number of pilot projects of these programs show that the simple digitalization of traditional vessels will not be enough for the expanded use of OUS platforms.

In Utah, in September 2018, the pilot program of the OUS "Utah Online Dispute Resolution" was launched. In a report on this program 2 years after its implementation, it is noted that "the OUS pilot project had little impact on the way disputes were resolved"[9]. The main reason for this result may be the fact that the interface of the platform was not very convenient and understandable for users, the information provided was unclear, in addition, these users faced various technical difficulties when logging in. A number of users encountered difficulties uploading documents (7 out of 8 study participants) and signing settlement agreements (5 out of 7 participants). Since courts everywhere are trying to implement OUS to improve the efficiency of their activities, they should pay attention to the ease of use of the platform, reducing technical errors when using it, in order to simplify the participation of users in the judicial process.

The digitalization of the civil justice system allows us to conclude that the courts will perform the following functions in the system of state legal relations [4]:

- Data usage. The courts will develop and monitor new tools for judicial databases, including legal aid chatbots connected to the court and OUS systems.
- Data distribution. The courts collect huge amounts of data obtained by the legal system and establish the conditions under which this data is provided to external entities wishing to use it for various purposes.
- Regulatory function. The courts will determine which software providers may or may not provide legal services in accordance with existing regulations and rules of ethical and professional responsibility.

In addition to digitalizing the civil justice system, it is necessary to consider the possibility of creating an electronic database that makes it possible to make all court decisions in civil cases open and accessible. Thus, in addition to the functions of digital legal proceedings listed above, one more function can be distinguished – data analysis.

For example, by analyzing the data obtained, it will be possible to determine which types of cases require more involvement of judges and to what extent their participation is required. This makes it possible to determine in which cases and court procedures modern digital technologies (for example, artificial intelligence (hereinafter - AI)) should be used, as well as in which cases and procedures

courts need to use human resources. Thus, the dispute resolution system will become more effective [17].

To improve the effectiveness of the administration of justice, a number of countries have begun to implement AI for conflict resolution (for example, the United States, Japan, Colombia), the protection of rights and the promotion of social values. One way to use AI for these purposes is to help people understand the process of human reasoning when building a legal argument. The law is created and adopted through a chain of processes that include information processing, discussion and decision-making. Similarly, AI works by searching for information, presenting it, analyzing it, processing natural language, machine learning, and data mining [8].

In the United States, in 2016, the Los Angeles County Superior Court began using Gina, an online assistant that helps people resolve traffic fines online. The program provides its services in 6 languages (English, Armenian, Chinese, Korean, Spanish and Vietnamese). Before Gina appeared in 2014, people waited 2.5 hours to contact the Traffic Secretary. With the advent of Gina, the average waiting time has been reduced to 8-12 minutes, as the program processes 200,000 requests per year (as well as other methods of OUS in court). The cost of using Gina is $2,500 per year and given its contribution to the effectiveness of dispute resolution, it can be assessed as a very successful investment [2].

However, despite all the advantages of using online dispute resolution methods and using AI in the administration of justice, inherent disadvantages or risks must be taken into account. In the context of the rapid growth of OUS, in order to reduce risks and improve the quality of online dispute resolution, the International Council for Online Dispute Resolution began developing ethical standards in 2017, which will underlie the design, structure, practice and implementation of OUS systems [19]. Among these standards, the following are distinguished:

Availability. That is, it should be easy for the parties to use the OUS system, communication channels should be open and accessible, costs for participants should be minimized, the OUS system should be easily accessible to people with different capabilities.

Accountability. DMS systems must be continuously accountable to the institutions, legal structures, and communities they serve. The platforms should be verifiable, and the audit results should be available to users.

Competence. DMS service providers should have relevant experience in dispute resolution. The services of the OUS system should be timely and make effective use of the time of the participants.

Confidentiality. OUS providers should make reasonable efforts to maintain confidentiality in communication between the parties in accordance with the developed privacy policy. This policy should be fully communicated to all participants of the OUS.

Equal rights. DCS service providers should treat all participants with equal respect and dignity. None of the participants should enjoy greater privileges and advantages than others. There should be no bias.

The legal framework. OUS service providers must comply with and disclose to the parties the relevant laws and regulations that are used in the proceedings.

Safety. OUS service providers should make reasonable efforts to ensure the security of OUS platforms, as well as data collection and to prevent the transmission of messages between persons participating in OUS to any unauthorized parties.

Transparency. OUS service providers should openly disclose in advance, in a meaningful and accessible form: the form and feasibility of dispute resolution processes and results, and potential risks.

In view of the increasing use of AI in legal proceedings, the National Center for Technology and Dispute Resolution (NCTDR) has introduced new and supplemented old ethical principles for the OUS initiative, taking into account the use of AI [18].

1) Accountability, neutrality and transparency.

NCTDR explains the principle of accountability as follows: "The design and implementation of DMS systems, processes and practices are accountable to the institutions, legal frameworks and the community they serve."

When using AI in court proceedings, questions may arise about who will determine the amount of data entered into the system and who will be responsible for its accuracy. In addition, since there is a constant need to update the systems with new court decisions, changes in legislation, etc., there will always be a question of how the system will be updated.

These problems are also related to how to maintain the transparency and neutrality of the system and avoid negative impact on users. The risks associated with accountability are caused by the fact that it is difficult to assess how the result generated by AI, and especially by machine learning models, will be achieved [6]. This creates the following problem: what and to what extent should AI-related service providers be responsible for (i.e. should suppliers be responsible only for monitoring and evaluating the accuracy of the data entered into the AI, or are they also responsible for eliminating any bias in the source data and whether this is even possible).

2) Fairness and impartiality

NCTDR explains the principle of fairness as "the promotion and maintenance of due process, without bias or benefits for or against individual groups, including those based on algorithms, and impartiality as a system that will be "designed and implemented, and practitioners will act in accordance with the obligation to reduce bias in the administration of justice"".

However, is it possible to verify that the similar data themselves are not biased? For example, "after taking into account the level of offenses, criminal history, area and type of offense, blacks, Latinos and others received sentences 5.5, 4.5 and 2.3 months longer than whites, respectively, and women received 5.5 months less than men. [...] With this average estimate, blacks receive about 12% longer sentences than whites, and men receive 12% longer sentences than women"[3]. Other studies on racial bias show that when sentencing, judges assess the risks of the defendant's danger to society or the risks of his escape, and based on the results of this assessment, they decide on the possibility of bail, etc. [1]. As a result, especially for machine learning AI, whatever results the AI produces, they will reflect the bias of the source data.

To reduce the risks of data bias, a number of researchers suggest, for example, hiding race or other variables from the algorithm, which hypothetically may carry bias. Other studies indicate that this measure is insufficient, since information about race can be obtained based on other characteristics such as income, education, etc.[10]. Thus, there are two areas of scientific discussion about the mechanisms of applying this principle: data neutrality and algorithm control so that it does not reflect the bias of the source data, or the search for new ways to introduce impartial ones.

3) Informed participation

NCTDR explains the principle of informed participation as follows: "In the development and implementation of DMS systems and processes, active efforts are made to ensure (1) that participants understand all information about the risks and benefits of the process, (2) that participants are competent in evaluating information about participation in the process, (3) that participants understand the information, (4) if possible voluntary acceptance by participants of the risks of participation; and whenever voluntary consent is not possible due to the mandatory nature of participation, the possible risks should be transparent [14].

The second point is especially related to the transparency of the system and, in addition, how comfortable users will feel using this system. However, in the situation with machine learning AI focused on OUS, as already stated above, the following problem arises: how is it even possible to explain the nuances of the system to unqualified participants in the process, if even a programmer cannot always assess how the AI achieves a certain result? Like any other field, the use of AI attracts a lot of attention in the legal field, but it seems that more time and systematic evaluation will be required before ordinary citizens can confidently use it with a full understanding of its consequences.

CONCLUSION

The Covid-19 pandemic has revealed a number of weaknesses in the traditional judicial infrastructure. Courts both in the United States and in other foreign countries had to quickly make changes in their activities, in the form of services provided, increasingly using various digital

technologies. Currently, the use of OUS in courts is probably still at an early stage, but users of these systems see both advantages and disadvantages of using digital technologies.

In the future, the trend towards digitalization in the judicial system will inevitably increase, therefore, DMS systems should be subject to constant updates in order to improve the quality of data collection and analysis. Digital technologies used in legal proceedings should be understandable to its users, should improve the efficiency of the administration of justice, and provide society with a more convenient and accessible dispute resolution system.

The digitalization of legal proceedings has also changed the principles of online justice, as the use of AI technologies raised additional questions about transparency, impartiality and informed participation. Therefore, the new OUS systems are already creating significant ethical difficulties that need to be resolved, as they have changed the role of the court in the administration of justice, changed the dynamics of interaction between courts and the parties to the dispute and changed traditional dispute resolution methods.

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