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Robot Judge and the Right to a Fair Trial

[Sędzia-robot a prawo do rzetelnego procesu sądowego]

Abstract

Today's "anthropocentric" legal system does not allow court cases to be resolved by artificial intelligence systems. However, it is almost obvious that soon, increasingly advanced technological tools will become involved in the justice system to an ever-greater extent. In this context, fundamental systemic questions are already emerging. First, therefore, the question must be asked whether constitutional norms require—and if so, to what extent—human participation in the adjudication of judicial matters. Secondly, the answer to the question of whether it would be permissible considering the constitutional (and international) standard of the right to a fair trial—and thus to a duly constituted court established by law—and, finally, in view of the right of the parties to be heard in court proceedings. The aim of this article is to present the basic problems related to these issues in the context of current constitutional standards.

Keywords: robot, artificial intelligence (AI), right to a court, court, justice.

Introduction

In recent years, artificial intelligence has become unpredictable and has taken on a "life of its own".¹ This issue cannot be overlooked in the context of constitutional institutional arrangements (including matters relating to fundamental rights and freedoms) and the functioning of public authorities, in particular the judiciary. In the case under analysis, however, the key issue is not the assessment of the 'personality' or, more broadly, the 'subjectivi-

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¹ T. Voigt [in:] Beck-online Grosskommentar BGB. Gesamt—Hrsg: Gsell/Krüger/Lorenz/Reymann (eds.): Spickhoff, 1.02.2025, BGB § 823, no. 759.

ty' of artificial intelligence as such, but rather whether AI systems meet the criteria and standards that should characterise the modern justice system, particularly in the light of international law (human rights protection) and constitutional requirements.

The use of artificial intelligence systems within the functioning of the judiciary is determined primarily by the framework of constitutional-level structural norms. It is typically constitutional provisions that set forth the fundamental principles and standards governing the judiciary's operation as one of the branches of public authority.

Until quite recently—including in Poland at the time of adopting the new Constitution in 1997—the constitutional legislator did not envisage robot judges, either because such technological possibilities did not yet exist² or were regarded merely as hypothetical. Even a dozen or so years ago, legal scholars' reflections on the operation of artificial intelligence systems—including the drafting of regulations in this field—were regarded as the work of unserious fabulists or as an exercise in legal futurology, although the 1947 Constitution of Bremen³ had already stipulated in Article 12(1) that human beings take precedence over technology and machines (*Der Mensch steht höher als Technik und Maschine*).⁴ The authors of this provision probably understood it quite differently back then than we do today.⁵ However, as early as the 1960s, the eminent Romanist Franz Wieacker warned that “cybernetic technology is associated with the pathos of utopian hopes for the unlimited liberation of humankind from its responsibilities—for example, a kind of statistical justice without the effort involved in making personal decisions. On the other hand, humanistic and cultural-critical self-satisfaction sounds the alarm regarding the progressive dehumanisation and the surrender of humans to inevitable constraints and mechanisms.”⁶

At present, the use of artificial intelligence systems in the judiciary remains limited. But, the future application of these systems may lead to the conclusion that a new type of autonomous legal entity should be recognized as a judge, capable of delivering substantive judgments in any civil or criminal case under consideration, on at least an equal footing with a human judge. Regardless of what the foreseeable near or distant future may hold, analy-

² A. K. Bernzen, *Roboter als Richter? Zur Automatisierung der Rechtsprechung*, 'Recht Digital' 2023, 3, p. 134; L. Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung*, Trier 2022, p. 127.

³ *Gesetzblatt der Freien Hansestadt Bremen* 1947, 47, pp. 251–257.

⁴ In the context under consideration, this provision is mentioned by D. Nink, *Justiz und Algorithmen. Über die Schwächen menschlicher Entscheidungsfindung und die Möglichkeiten neuer Technologien in der Rechtsprechung*, Berlin 2021, p. 351.

⁵ See W. Pfeil, *Der Mensch steht höher als Technik und Maschine—Benötigen wir ein Grundrecht zum Schutz vor Künstlicher Intelligenz?*, 'International and Comparative Law Review' 2020, vol. 2, p. 88.

⁶ F. Wieacker, *Recht und Automation* [in:] *Festschrift für Eduard Bötticher zum 70. Geburtstag*, Berlin 1969, p. 387.

ses on this subject are already appearing with increasing frequency in legal journals. Furthermore, academic monographs devoted to this issue are being published. The aim of this analysis is to highlight the key issues surrounding the question of whether ‘smart courts’—understood as machines capable of resolving disputes between citizens in the same way as traditional courts composed of professional human judges—are permissible.

AI Tools and the Judiciary

From the perspective of the technological progress already observable today, the use of AI tools in the judiciary remains very limited. They may be—and increasingly are—employed primarily for the anonymization or pseudonymization of judicial decisions, documents, or data, and additionally for legal information retrieval. Tools of this kind are being used successfully and on an increasingly widespread basis, and not just by judges. Information technologies thus continue to function merely as instruments supporting the judge’s work—tools that must, moreover, be approached with considerable caution due to operational defects commonly referred to as artificial-intelligence “hallucinations”.

Even though these tools are not yet highly developed, there should be no doubt that the development of artificial-intelligence—including its application within the administration of justice—will continue to advance. The use of artificial-intelligence systems in the judiciary on a significantly broader scale not only as tools to assist humans, but at least to some extent as independent actors, will soon become unavoidable. The question of the extent to which such ‘autonomy’ would be permissible is therefore already relevant today. The Chinese example of already existing “smart courts” and “intelligent justice” illustrates the far-reaching possibilities in practice.⁷ The prospect of robot judges still terrifies many people, even though autonomous systems are imperceptibly making ever deeper inroads into various other areas of our lives.

Consequently, as technological solutions become more sophisticated, the scope of modern tools used in judicial work will change significantly over time. From today’s perspective, we are probably unable to even foresee the direction and scope of the potential development of modern technologies.

⁷ See e.g. Ch. Shi, T. Sourdin, B. Li, *The Smart Court—A New Pathway to Justice in China?*, ‘International Journal for Court Administration’ 2021, vol. 12, 1, *passim*; S. Yupeng, *History and Prospects of Creation of “Smart Courts” in the PRC: Problems of Application of the Artificial Intelligence Technology*, ‘History of State and Law’ 2023, May, 11, p. 44; Z. Tang, *Smart Courts in Cross-Border Litigation*, ‘*Rabels Zeitschrift für ausländisches und internationales Privatrecht*’ 2023, vol. 87, p. 497 *et seq.*

We can be confident that technological development will lead to a situation in which these systems are deemed sufficiently advanced to remove the human decision-maker from dispute resolution at least in certain areas. Just as AI today independently solves tasks that are not yet particularly complex—something which generally no longer raises too many objections—it will soon be making decisions on far more serious matters. The AI systems would thereby become, to a significant extent, a new component of the system of public authority, as particular categories of cases are entrusted to them for adjudication, effectively “delegating” state-authority tasks currently exercised, on behalf of society, by professional human judges. The right tool (machine) can already serve as a useful aid to a judge’s work. In practice, too, the use of artificial-intelligence systems in the administration of justice is not merely a matter of abstract futurological speculation. The use of artificial intelligence is planned in Estonia and is already being applied to some extent in German order for payment proceedings (*Eine maschinelle Bearbeitung ist zulässig*, § 689(1), second sentence, of the the German Code of Civil Procedure (ZPO);⁸ see also §§ 703b and 1088 of the the ZPO; similarly, regarding simplified proceedings in family matters, see § 258(1) of the *Familienverfahrensgesetz*).⁹ The key question in this regard is whether—and where—the limits of trust lie when it comes to decisions that may not be verifiable at all by human standards, or even by the language available to us. Using a “smart court” that operates on a “black box” principle would, in effect, mean relying on a highly risky—and ultimately unverifiable—decision. This concern is not alleviated by the fact that, in reality, at least to some extent, the human brain and the decision-making processes taking place within it—and therefore also the processes occurring in the mind of a human judge—are a similar “black box”.¹⁰

Bearing in mind this future prospect of their broad application as technological progress continues, it is already necessary to initiate a discussion on whether—and within what constitutional boundaries—the use of AI tools in the judiciary is permissible. Their deployment must ensure full respect for constitutional standards of protection (for instance, regarding the processing of the personal data of parties or participants in judicial proceedings). It may also be necessary to revise these standards to accommodate the requirements associated with using AI systems as “robot judges”.

⁸ „1. The dunning procedure is conducted by district courts [Amtsgerichte]. 2. Automated processing is permissible.”

⁹ G. Rühl, *Einsatz von KISystemen in der Justiz* [in:] *Künstliche Intelligenz. Wie gelingt eine vertrauenswürdige Verwendung in Deutschland und Europa?*, Bundesministerium für Umwelt, Naturschutz, nukleare Sicherheit und Verbraucherschutz, F. Rostalski (ed.), Tübingen 2022, p. 281.

¹⁰ J. J. Vasel, *Künstliche Intelligenz in der Justiz*, ‘Legal Tech Zeitschrift’ 2023, vol. 3, p. 184.

AI as a Holder of Judicial Authority

In undertaking an assessment of the permissible scope for the use of AI in the functioning of public authorities (which include the judiciary) and administration of justice, one must, above all, keep in mind the constitutional constraints, foremost among them the principle of democracy understood as representative governance (see Article 179 in conjunction with Article 4 of the Constitution of the Republic of Poland).¹¹ Judges are holders of public authority, and, as such, their position requires at least an indirect chain of legitimacy deriving from the people. They must therefore possess what is known as “democratic legitimacy”.¹² However, unlike the legislative and executive branches, citizens’ ability to influence judicial appointments is limited (which, in European systems, is usually linked to the irremovability of judges), the procedure for appointing judges, in accordance with the principle of democratic legitimacy, must also provide for at least an indirect influence of the public’s choice (exercised through representatives in parliament or the head of state).¹³ This requirement is, moreover, the first to raise doubts about the possibility of replacing human judges with machines. It would be difficult to imagine—although, purely theoretically, it is certainly not impossible—a machine having a democratic mandate from citizens to exercise power on their behalf. Moreover, this legitimacy cannot be viewed merely as a means of appointing (selecting) a holder of judicial power but must also be seen in the context of the requirement to apply the principle of legality, that is, to be bound by legislation and to adjudicate within the framework of the existing legal order.¹⁴

Entrusting judicial authority to judges delineates both the institutional and the personal framework within which that authority is exercised. In this context, the view seems to prevail, that “the judiciary must be exercised by natural persons (the personal element) and must constitute a public function entrusted to and vested in those persons (the institutional element).”¹⁵

¹¹ See e.g. A. K. Bernzen, *Roboter...*, p. 134; S. Huber, *Entscheidungsfindung im Zivilprozess durch künstliche Intelligenz* [in:] *Prozessuales Denken und Künstliche Intelligenz*, Ch. Althammer, H. Roth (eds.), Tübingen 2023, p. 47; L. Wolff, *Algorithmen...*, p. 221 et seq.

¹² See e.g. D. Nink, *Justiz...*, p. 321 et seq.; from general literature e.g. E.-W. Böckenförde, *Demokratie als Verfassungsprinzip* [in:] *Handbuch des Staatsrechts, Band II, Verfassungsstaat*, J. Isensee, P. Kirchhof (eds.), Heidelberg 2004, p. 429 et seq.; T. Groß, *Grundlinien einer pluralistischen Interpretation des Demokratieprinzips* [in:] *Demokratie und Grundgesetz. Eine Auseinandersetzung mit der verfassungsgerichtlichen Rechtsprechung*, Baden-Baden 2000, p. 98 et seq.; A. Voßkuhle, G. Sydow, *Die demokratische Legitimation des Richters*, ‘Juristenzeitung’ 2002, vol. 14, p. 673 et seq.; C. D. Classen, *Gesetzesvorbehalt und Dritte Gewalt*, ‘Juristenzeitung’ 2003, vol. 14, passim.

¹³ See e.g. A. Voßkuhle, G. Sydow, *Die demokratische...*, p. 676 et seq.

¹⁴ D. Nink, *Justiz...*, p. 324 et seq.; A. K. Bernzen, *Roboter...*, p. 135; L. Wolff, *Algorithmen...*, p. 225.

¹⁵ Einsatz von KI und algorithmischen Systemen in der Justiz. Grundlagenpapier zur 74. Jahrestagung der Präsidentinnen und Präsidenten der Oberlandesgerichte, des Kammergerichts, des Bayerischen Obersten Landesgerichts und des Bundesgerichtshofs vom 23. bis 25. Mai 2022 in Rostock, p. 6.

This view remains valid under the Polish Constitution of 1997. Pursuant to Article 178(1) of the Constitution of the Republic of Poland, judicial authority is exercised by judges (*verba legis*: “judges in the exercise of their office”). At least until recently, it was obvious to everyone that when the framers of the constitution referred to ‘judges’ in its provisions, they meant only natural persons.

As Anna K. Bernzen aptly observes, “an automatic system does not receive remuneration and cannot retire—but it can be switched off.”¹⁶ This is not neither merely the physical characteristics of the entity nor formal requirement of “being a person” with specified competencies (legal knowledge, age, and so forth). The core of the problem concerns qualities traditionally associated with human reasoning, such as the ability to process information within a specific judicial proceeding, including identifying specific problems and making decisions autonomously and responsibly.¹⁷

Being a judge means being open to other people’s cases and the issues at stake, which often determine the course of people’s entire futures. A judge must also “put himself in the other person’s shoes,” make an empathetic assessment, take into account the social consequences of decisions, identify problems, and make decisions in an autonomous and responsible manner.¹⁸ It is therefore difficult to imagine that a machine—which is usually perceived as a soulless, lifeless tool incapable of empathy or of making individual judgments about human behavior—could possess such qualities. It is obvious that a judge cannot act mechanically or unreflectively, nor function as an “automaton” designed solely to process data and “output” the result of that processing (a judicial automaton, Richterautomat).¹⁹ This is the case regardless of the fact that people do not always make sound and rational decisions; as judges, they can be biased, make errors in reasoning and have other “weaknesses in rationality”.²⁰

Such qualities can certainly be possessed by a human being, and as of today, they remain beyond the capacities of a machine. All machines can do today is give the impression that they are capable of mimicking human behaviour. However, what we perceive as a “personalised approach” is nothing more than dry data processing within a system of algorithms. In a well-known decision from 2016, the German Federal Constitutional Court stated that “judicial law-finding is not limited to the execution of predetermined norms in the sense that the judge would act merely as the ‘mouth of the statute’, that is, as a ‘subsumption automaton’. Rather, every act of adjudication inherently involves the methodological interpretation of statutory norms and the definition of

¹⁶ A. K. Bernzen, *Roboter...*, *ibid.*

¹⁷ *Einsatz von KI...*, p. 9.

¹⁸ *Einsatz von KI...*, p. 9.

¹⁹ *Ibid.*

²⁰ See D. Nink, *Justiz...*, p. 460.

their scope of application, to decide, based on a positive, abstractly formulated legal provision, how it should be applied in an individual case.”²¹

Also in light of Article 45(1) of the Constitution of the Republic of Poland, which establishes the individual right of access to a court, it is still accepted as a paradigm, although it was developed without direct reference to the issues analysed here, that a “court” within the meaning of this provision is constituted by judges who are natural persons, appointed to judicial office on the basis of the relevant constitutional and statutory regulations, and who meet specified criteria (such as holding a higher legal education, completing judicial training, and possessing unimpeachable character).

The Polish Constitution permits the participation of what is commonly referred to as the “social element” in the administration of justice. Under Article 182 of the Constitution, the participation of citizens in the administration of justice is determined by statute. This means that functions ordinarily assigned to professional judges may, at least to some extent, be performed by natural persons who do not meet the aforementioned requirements (that is, who are not professional judges), but who satisfy criteria set out in statutory law, particularly regarding the categories of cases in which they may adjudicate and the manner of their selection to the office of judge or lay judge. Under current law, lay judges (*ławnicy*) fall within this category in the Polish legal system. In every instance, however—including the administration of justice by non-professional judges—the reference is invariably to “flesh-and-blood” human beings.²² These considerations lead *prima facie* to the conclusion that, under the *de lege fundamentalis* framework, the administration of justice—and therefore the issuance of judicial decisions—may not be carried out by an entity that is not a natural person and does not possess the characteristics described above; that is, an entity lacking legal personality and full legal capacity, and one that has not been appointed through the appropriate procedure to serve as a professional or lay judge. Ergo, within the meaning of constitutional norms, there can be no conceptual category of a “robot judge” (*Roboter-Richter*).²³ This also informs the understanding of what constitutes an independent court (within the meaning of Article 45(1) of the Polish Constitution, which enshrines the constitutional and universally accepted principle of the fundamental right to a fair trial), since such a court may be constituted only by the participation of a person (or persons) who qualify as judges in the sense described above.

Consequently, the potential involvement of a “robot judge” in the administration of justice would require a change to constitutional provisions or,

²¹ Decision of the German Constitutional Court of 22.08.2016, 2 BvR 2953/14, ‘Neue Zeitschrift für Verwaltungsrecht’ 2016, vol. 22, p. 1630; see also e.g. D. Nink, *Justiz*..., p. 31, 457.

²² D. Nink, *Justiz*..., p. 260 et seq., 351, 354 et seq., 463.

²³ G. Rühl, *Einsatz*..., p. 281.

at the very least, a modification of the current paradigm, which, however, seems unlikely. Let us leave aside, for the sake of this narrow discussion, the question of whether such a potential constitutional amendment would constitute a breach of the fundamental principles underpinning the standards governing the administration of justice in civilised societies or would at the very least require a significant reinterpretation of fundamental rights. It is worth noting, however, that the above conclusions are not self-evident.

It would be necessary to explicitly determine that digital tools may participate in the exercise of judicial authority, at least where this involves issuing binding decisions in civil or criminal matters. Although the literature rightly notes that no systems capable of fully replacing a judge will emerge in the immediate future,²⁴ this issue will inevitably require resolution in the more distant—though not overly distant—future.

It is worth noting, however, that the inadmissibility of such participation by machines in the administration of justice is not universally regarded as self-evident. In German legal scholarship it has been argued that the autonomous norms of the Basic Law merely establish that “at least a judge who is a human being, in the form defined by the legislature, is compatible with the Constitution,” while adding that “this conclusion does not, however, imply that the introduction of legal generators to perform judicial functions would be impossible—it would merely require numerous amendments to ordinary legislation.”²⁵ According to Lydia Wolff, a change in the interpretation of the Basic Law is conceivable, and this may entail that the constitutional concept of a judge could itself be revised.²⁶ Similar conclusions can also be drawn under the provisions of the Polish Constitution of 1997. After all, no provision of the Constitution explicitly states that a judge must be a human being. Perhaps the question should not be “whether”, but “how” a “smart court” would operate; in particular, what oversight mechanisms should be put in place to ensure it functions properly and to enable the correctness of the rulings issued to be verified.

The Right to a Robot Court?

Although this is not currently possible, it is worth considering whether, in the future, at least to some extent, the following tasks could be entrusted to artificial intelligence systems: possessing legal knowledge at an appropriate professional level, interpreting and applying the law, reconstructing the

²⁴ G. Rühl, *Einsatz...*, pp. 282 and 283.

²⁵ L. Wolff, *Algorithmen...*, p. 131.

²⁶ L. Wolff, *Algorithmen...*, p. 144.

meaning of vague legal texts and phrases or general legal concepts, as well as conducting complex dialogue with the parties to court proceedings.²⁷ All these activities constitute the process of legal reasoning within the administration of justice. Of course, a machine can easily be programmed today to possess full knowledge of the applicable legal provisions and, at least to some extent, to apply them to specific factual situations presented to it. It can therefore be considered, *prima facie*, that such a situation fulfils the Latin phrases *iura novit curia* and *da mihi factum, dabo tibi ius* almost perfectly.²⁸ One can then be certain at first glance—and, consequently, have the reassurance of a professional ruling—that, unlike a human judge, an AI “in a judge’s robe” will not overlook any provision that ought to be considered in the case and, where appropriate, applied.

However, the issue is far more complex. In this context several specific questions and problems arise that, even considering the constitutional right of access to a court, require answers.

Firstly, as already mentioned, the constitutional right of access to a court and a fair trial before it (Article 45[1] of the Constitution of the Republic of Poland, Article 47[2] of the Charter of Fundamental Rights of the European Union and Article 6 of the ECHR). The right to a fair trial means, in particular, that an individual cannot be merely an “object” of the proceedings, but must remain a subject of rights and be able to influence both the course of the proceedings and the outcome of the case.²⁹ In this context, the question arises as to whether an artificial intelligence system could replace a judge in adjudicating a case, given the principle of the publicity of proceedings and, in particular, the party’s right to be heard, including at a public hearing. Considering this essential component of the constitutional right to a court, it follows logically that the parties to the proceedings have the right to present a case before the court, to speak before the judge hearing the case,³⁰ and therefore a body comprising an official who understands the content presented to them and analyses, on an ongoing basis, all the circumstances relating to the information presented at the hearing. So the parties must be understood and feel understood.

The elements of the right to be heard—contained within Article 45(1) of the Constitution and flowing from the principle of the rule of law in judicial proceedings³¹—include: the right to be heard in court, the right to be informed

²⁷ Einsatz von KI..., p. 5.

²⁸ See also J. J. Vassel, *Künstliche...*, p. 186.

²⁹ Judgment of the German Constitutional Court of 29.05.1991, 1 BvR 1383/90, BVerfGE 84, 188 (190); 86, 133 (144 et seq.); Einsatz von KI..., p. 14.

³⁰ Einsatz von KI..., p. 13; D. Nink, *Justiz...*, p. 302 et seq.; see also e.g. Ch. Rollberg, *Algorithmen in der Justiz. Rechtsfragen zum Einsatz von Legal Tech im Zivilprozess*, Baden-Baden 2020, p. 138 et seq.

³¹ The Constitutional Tribunal indicates that the essence of a fair (reliable) procedure may be reduced to: (1) the opportunity to be heard (the parties’ entitlement to present their position), (2) the clear disclosure of the reasons for the decision, in order to avoid arbitrariness or even capriciousness on the part of the authority, and (3) ensuring predictability for the participant in the proceedings through adequate coherence and internal

by the court of the proceedings taking place and their subject matter, and the right to expect the court to take into account, or at least consider, the arguments put forward when reaching a decision on the merits of the case.³² The essence of this component of the constitutional guarantee is that—as the literature emphasizes—“the court hearing the case—meaning a human judge [menschlicher Richter]—must acquaint himself or herself with the factual and legal arguments presented and consider them in the decision.”³³ The right to hear the parties is tantamount to imposing an obligation on the judge “to grasp the essence of the arguments put forward.”³⁴

The point is therefore not merely to create conditions under which an automated system would allow the parties to present their factual and legal positions “in the same way as a human judge in written proceedings must ensure for the parties.”³⁵

The requirement to ensure the right to be heard obliges the court to “take on board” the information presented, and thus to rationally take note of the arguments put forward by the parties to the proceedings, to consider them comprehensively, and then to accept or reject them when delivering its judgment. This means that the judge must engage with the reasoning presented and subject it to appropriate analysis before deciding, rather than merely acting as its “carrier”, a mere passive recipient. In this sense, the judge remains a participant in the court proceedings, as his or her involvement—understood as interaction with the parties—is essential. This requirement must then be reflected in the substance of the decision itself—it is therefore assumed that the courts have taken note of the parties’ submissions and have given them due consideration.³⁶ The right to be heard, as an element of the constitutional right of access to a court, is likewise emphasized in the case law of the Polish Constitutional Tribunal.³⁷

The necessity of respecting this aspect of the constitutional right to a court is undoubtedly a significant argument against the admissibility—within the framework of constitutional guarantees—of replacing the “human judge” with a machine. In this sense, one must concede that these legal scholars are right who observe that “judicial authority has been entrusted to judges,” meaning that “it is human beings who must make decisions that embody

logic of the mechanisms to which they are subjected (the so-called core of fair judicial procedure — see the judgment of the Constitutional Tribunal of 20 October 2010, P 37/09, OTK ZU no. 8/A/2010, item 79).

³² Einsatz von KI..., p. 13 and the literature cited therein.

³³ G. Rühl, Einsatz..., p. 283.

³⁴ Decision of the German Federal Court of Justice (BGH) of 26.11.2019, VI ZR 84/18, NJW 2020, vol. 22, no. 6, p. 1594.; V. Vorwerk, *Algorithmen in zivilprozessualen Verfahren* [in:] *Prozessuales Denken und Künstliche Intelligenz*, Ch. Althammer, H. Roth (eds.), p. 73.

³⁵ A. K. Bernzen, *Roboter...*, p. 136.

³⁶ Decisions of the German Constitutional Court: BVerfGE 65, 293 [295]; BVerfGE 84, 188 [190]; BVerfGE 86, 133 [144].

³⁷ See e.g. Judgment of the Constitutional Tribunal of 02.10.2006, SK 34/06, OTK ZU 9/A/2006, item 118.

justice.”³⁸ This is not, however, due to a person’s physical characteristics, but rather to their ability to analyse information and reason logically, as well as—and this is by no means insignificant—their ability to verify their decision-making process. In the case of a machine, the latter may be significantly impeded, at the very least.³⁹ Accepting a different premise—and consequently adopting a system in which the judicial process of analysis is not carried out by a human being—would violate the constitutional right to a lawful judge (and “tribunal established by law”) as understood in this context, which forms an integral part of the broader right of access to a court.

Moreover, the irreplaceability of the “human judge” by an artificial-intelligence system is undoubtedly connected with the principle of judicial independence.

Judicial independence has several important aspects, a detailed analysis of which goes beyond the narrow scope of this presentation. In any case, it is not intended to serve the judge’s convenience, nor does it constitute a fundamental right of the judge; it has been established in civilized states as a “precondition for a lawful decision-making process.” Consequently, “a judge may not dispose of his or her independence at will.”⁴⁰ This, in turn, means that a judge must be independent at every stage of court proceedings. Consequently, it would be unacceptable for a judge to be bound by the results of an automated system, even if this were in accordance with the judge’s own wishes.⁴¹

In this respect, the interference entailed by replacing the judge or by obliging the judge to use an AI system as a binding mechanism for resolving cases would all the more readily be viewed as, at minimum, a constitutionally “unnecessary interference,” meaning an influence that is not essential to maintaining the functioning of the administration of justice.⁴² The AI system would be designed to make the referee’s job easier and simplify the process, rather than benefit the parties themselves. This also relates to the inadmissibility of treating the machine as an “expert witness”, and consequently requiring the judge to rely on such assistance.

The premise that a judge may not be bound by the outcome of a machine’s reasoning follows from the fact that, under the current constitutional framework, full responsibility for and the act of adjudicating a case lie exclusively with the adjudicating panel (that is, with the human judge).⁴³ It is, admittedly, possible to imagine a situation in which such a decision-making process would be entrusted, at least to some extent, to an AI system and would not be subject to independent assessment and verification by a human judge. How-

³⁸ V. Vorwerk, *Algorithmen...*, p. 72.

³⁹ For further details, see, for example, D. Nink, *Justiz...*, p. 334 et seq.

⁴⁰ A. K. Bernzen, *Roboter...*, p. 137.

⁴¹ *Ibid.*

⁴² D. Nink, *Justiz...*, p. 278 et seq.; *Einsatz von KI...*, p. 9.

⁴³ See: D. Nink, *Justiz...*, p. 301 et seq.; *Einsatz von KI...*, p. 7.

ever, an independent judge is a judge who is autonomous in making decisions and handing down judgements. Independence must be comprehensive; it cannot be “divided” between the judge and another participant (actor) who, apart from the judge, would have a “separate” part in the decision-making process. The constitutional requirement and, at the same time, the competence of the courts to deliver judgments means that they alone have exclusive authority over this sphere of public power. This authority is therefore indivisible in the sense that no part of it may be transferred to any other institution or entity (see Article 174 of the Constitution of the Republic of Poland)⁴⁴.

Furthermore, it is apt to observe that a judge’s subordination to the results produced by an automated system would weaken the perception of the judge as a neutral decision-maker.⁴⁵ In this case, however, what is at stake is the public’s trust in the justice system.⁴⁶ This fear persists even when one sets aside one’s personal apprehensions about being “served” by a machine, which stem from personal experiences (“algorithmic aversion”⁴⁷). One can, in fact, place one’s trust in a specific body whose decision is its own and is not influenced by anyone or anything else over which the decision-making body has no control.

It is worth noting, in passing, that in this context there arises the risk of the so-called default effect, whereby a judge tends to “accept the system’s results because departing from them would require considerable effort to justify and would entail the risk of an incorrect decision.”⁴⁸

Lydia Wolff additionally points to a significant danger, emphasizing that “the problem of complex algorithmic value-based decisions in the context of guarantees of independence lies (...) not so much in the fact that protecting independence—understood as avoiding external influence—would become fundamentally impossible, but rather in the fact that vesting independent decision-making authority in the form of an algorithm (given the predictability of all outcomes that follow from it) would lead to unlimited interpretive power over social values (...)”⁴⁹ This leads the author to the well-founded conclusion that—taking into account the principle of the separation of powers—the interpretation of complex value-laden issues must remain in the hands of independent human decision-makers in individual cases.⁵⁰ It should

⁴⁴ This should be understood, in particular, as the judiciary’s monopoly on the resolution of disputes, understood as the administration of justice within the meaning given to that concept by the Constitution. On the subject of the judiciary’s monopoly, see, for example, D. Nink, *Justiz...*, p. 261, 272 et seq.; P. Wysł [in:] *Das Staatsrecht des Bundesrepublik Deutschland. Band II*, K. Stern, H. Sodan, M. Mösl (eds.), München 2022, p. 726; G. Morgenthaler [in:] *Grundgesetz, Beck’sche online Kommentar*, V. Epping, Ch. Hillgruber (eds.), 60, Ed. 28.12.2024, Art. 92, no. 32.

⁴⁵ A. K. Bernzen, *Roboter...*, *ibid.*

⁴⁶ *Ibid.*

⁴⁷ J.J. Vassel, *Künstliche...*, p. 184.

⁴⁸ A. K. Bernzen, *Roboter...*, *ibid.*

⁴⁹ L. Wolff, *Algorithmen...*, pp. 162 and 163.

⁵⁰ L. Wolff, *Algorithmen...*, p. 163.

therefore be accepted that this danger outweighs the perceived benefits of using AI systems, namely enhanced predictability of decisions grounded in a universal, uniform interpretation of the law, and thus most likely greater predictability in its application.

Another advantage of using AI systems is that they probably may offer a stronger guarantee of neutrality and impartiality than a human being. “Robots in robes” would be devoid of emotion and thus, in a sense, more steadfast and continuously available to the parties as the “mouth of the law” (*bouches de la loi*)⁵¹ in accordance with Montesquieu’s ideal of the judge.⁵² This is because—as we assume—an algorithm operates without emotion, without positive or negative attitudes arising from attachment to particular views or perceptions of the parties, without personal desires or prejudices as such, and without any internal interests in any form; consequently, it cannot possess biases or self-interested expectations regarding the outcome of the proceedings.⁵³ This assumption is tempting, all the more so when we realise that the decisions of human judges are also shaped by diverse and often even elusive or irrational motivations or stimuli, their current state of mind, medical conditions, stress, emotions, upbringing, prejudices, errors in reasoning, and shortcomings or weaknesses in rationality.⁵⁴ It is also difficult to imagine a way of influencing a robot that would, for example—as Lydia Wolff points out—involve someone with a stake in the outcome of a case “just before the trial begins, in secluded corners, reminding the algorithms of past friendships, threatening them with social decline, or winning their favour through a particularly charming demeanour”.⁵⁵ It would be all the more difficult to offer artificial intelligence a financial benefit in exchange for a favourable ruling. Algorithms do not get headaches.

This undeniable advantage of AI systems, however, is far from certain. Even today, we can observe a wide range of behaviours in AI systems that are far from being free of bias or what we might describe as ‘technological neutrality.’ So-called discriminatory tendencies have been observed in the operation of algorithms.⁵⁶ At the present stage of technological development, there can be no guarantee that artificial-intelligence systems, as “generators of law”, would be free from dependence on human selection of decision-making determinants and thus immune to subjectivity to a degree at least comparable

⁵¹ Charles-Louis de Secondat Montesquieu, *De l’esprit des lois*. Livre XI, chap. 6, 1748: ‘Les juges de la Nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés qui ne peuvent ni en adresser la force ni la rigueur’.

⁵² See A. Schunder-Hartung, *Roboter-Richter: Stehen wir vor einer Rückkehr der “Bouches de la loi”?*, ‘Betriebs-Berater’ 2021, vol. 49, p. 1; D. Nink, *Justiz...*, p. 39; J. J. Vassel, *Künstliche...*, p. 186.

⁵³ L. Wolff, *Algorithmen...*, p. 156.

⁵⁴ D. Nink, *Justiz...*, p. 28.

⁵⁵ L. Wolff, *Algorithmen...*, p. 165.

⁵⁶ J. J. Vassel, *Künstliche...*, p. 183.

to that found in human judges (most notably as a result of supplying a manipulated dataset for AI training).⁵⁷ Of course, one cannot assume that manipulation has taken place from the outset, but one cannot rule it out either. Artificial intelligence systems that are externally controlled and susceptible to manipulation would be particularly dangerous in the hands of authoritarian or totalitarian regimes. The more advanced the technology becomes, the more difficult it will be to objectively verify the correctness and ‘neutrality’ of its operation. What is more, there is not only the danger associated with so-called “algorithmic hallucinations” and the lack of any guarantee that data will be processed correctly, but the risk of “algorithmic bias” linked to programmed prejudices is already being recognised today.

This is where the vital role of control becomes apparent and the ability to trace the system’s “reasoning” process becomes apparent—something that already appears, for technical reasons, to be significantly impeded. David Nink rightly points out, with regard to assisting the judge’s decision-making, that “a structured and comprehensible statement of reasons must ensure that the (overall) judicial decision is understandable at all times to those concerned: if the judge incorporates an algorithmically determined forecast into their decision, the criterion of comprehensibility also encompasses the fundamental mode of operation of the system”.⁵⁸

All this also affects the potential need to modify the interpretation of the concept of “independence” as applied to artificial-intelligence systems that might exercise judicial authority, shifting the focus toward considerations concerning the scope and security of collected datasets. Lydia Wolff rightly emphasizes that “the protection of independence in the digital context should therefore also serve to secure status. Exclusion from activity must, just like activation, be a matter for the legislature alone”. In her view, “as with any interconnected system, even the smallest gaps could become the starting point for a general system collapse. Such a collapse would have far more serious consequences than the failure of an individual judge and could be more difficult to overcome. If there were no backup mechanisms to handle the sudden caseload manually, this could lead to a complete lack of legal protection. Safeguarding status should therefore carry immense importance.”⁵⁹

There are no guarantees that AI systems could not malfunction due to a technological defect—something that, given their advanced development, would be exceedingly difficult to detect and remedy.

⁵⁷ See L. Wolff, *Algorithmen...*, p. 165.

⁵⁸ D. Nink, *Justiz...*, p. 465.

⁵⁹ L. Wolff, *Algorithmen...*, p. 172.

Mechanism of Control

Assuming the paradigm of the human judge, and in light of the constitutional judicial monopoly,⁶⁰ understood as arising from the existing structural guarantees of the Constitution (see Articles 174 and 175 in conjunction with Article 178 of the Constitution of the Republic of Poland), an artificial-intelligence system certainly may not issue autonomous decisions that would not be subject to review by a judge. Among the essential features of judicial authority are the determination, establishment, and declaration of what is lawful.⁶¹ This excludes the use of algorithms to render final, substantive decisions on the merits of a case.⁶²

This is also substantively justified, because the exercise of judicial authority in this respect requires skills that, at least at the current stage of technological development, a mechanically operating machine does not possess.⁶³ The fact that, in the case of self-learning systems—similarly to a judge’s reasoning—it is not possible to reproduce the reasoning process precisely and unambiguously, step by step, as Anna K. Bernzen quite rightly observes, does not alter this conclusion (and thus does not per se exclude the possibility of automating elements of judicial activity).⁶⁴ The author emphasises that “even today, the parties can neither read the mind of a judge sitting alone nor have any insight into the deliberations of a panel of judges”.⁶⁵

What remains an open question is whether, and to what extent, a party or participant in the proceedings has the right to be informed that, in each respect, the judge relied on artificial-intelligence tools when making the decision. This matter is not currently regulated by law.

None of this means, however, that an AI system cannot serve as a tool assisting the judge in seeking the correct resolution, or as a mechanism enabling a kind of preliminary determination that could then be subjected to review at the request of a party (for example, in the case of an electronic order for payment⁶⁶). An artificial-intelligence system may—and should—be treated as an instrument supporting the human judge’s work, one that nonetheless requires a critical approach and verification on the part of the judge.⁶⁷ For instance, Estonia is planning to introduce a “robot judge” for cases valued at up to 7,000 euros, while providing for the possibility of judicial review of the

⁶⁰ See e.g., P. Wysk [in:] *Das Staatsrecht...*, p. 726; D. Nink, *Justiz...*, p. 261, 272 et seq., 463; G. Morgenthaler [in:] *Grundgesetz...*, Art. 92, no. 32; F. Schoch, J.-P. Schneider, E. Schmidt-Aßmann, W. Schenk (eds.), *Verwaltungsgerichtsordnung*, 46. EL August 2024, Einleitung, no. 34–36.

⁶¹ Decision of the German Constitutional Court of 28.11.1957, 2 BvL 11/56, NJW 1958, vol. 3, p. 97.

⁶² Einsatz von KI..., p. 6.

⁶³ *Ibid.*

⁶⁴ A. K. Bernzen, *Roboter...*, p. 135.

⁶⁵ *Ibid.*

⁶⁶ G. Rühl, *Einsatz...*, p. 281.

⁶⁷ See G. Rühl, *Einsatz...*, p. 285.

machine's decision upon a party's request.⁶⁸ In this context, it is worth considering whether, at least in the foreseeable future of technological development, "smart courts" might not be treated in a similar way to today's arbitration tribunals, where the submission of a dispute for adjudication—as an alternative to state courts composed of professional human judges—depends on the consent of the parties concerned.

Conclusion

In summary, under the constitutional norms currently in force, the use of "autonomous systems" or, more broadly, "artificial intelligence" to render substantive judicial decisions is precluded by the principles and values enshrined in the Constitution.⁶⁹ Certainly, replacing judges with machines would not be possible today either, given that AI lacks the ability to "understand its surroundings", to filter information, and to grasp the context of the cases to be adjudicated, each of which usually has its own specific elements.⁷⁰ David Nink aptly points out that "a fully automated judiciary—and thus, by definition, one devoid of individual character—can only be regarded as a dystopia".⁷¹

It is not, however, excluded that such a system—without performing the functions of judicial authority—could carry out certain auxiliary tasks, sometimes complex and difficult for a human to perform (such as the analysis and registration of metadata).⁷² Nor can it be ruled out that a machine could operate as a tool preparing a judicial resolution⁷³ in the realm of the analysis of norms and case law, or even formulate preliminary recommendations based on processed data.

In all cases, however, it must be acknowledged that an artificial intelligence system would, without question, remain subject to judicial oversight, functioning solely as a tool to assist the judge in resolving cases. Consequently, it must still be the human judge who remains the decision-maker in the administration of justice and who, within the applicable legal order, bears full responsibility for the consequences of the decision.

⁶⁸ G. Rühl, *Einsatz...*, p. 281, 283; *Einsatz von KI...*, p. 37 and 38; E. Nittler, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, 'Wired' 2019, 25.03; <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>.

⁶⁹ V. Vorwerk, *Algorithmen...*, p. 73; D. Nink, *Justiz...*, p. 354.

⁷⁰ D. Nink, *Justiz...*, p. 356.

⁷¹ D. Nink, *Justiz...*, p. 357.

⁷² *Einsatz von KI...*, p. 7; D. Nink, *Justiz...*, p. 355.

⁷³ *Einsatz von KI...*, p. 7.

Less doubts arise regarding the possibility of artificial-intelligence systems influencing judicial activity beyond the essence of adjudicatory functions—activity that is therefore subject to administrative supervision insofar as it concerns ensuring the proper conduct of proceedings.⁷⁴ *Prima vista*, such influence should be regarded as permissible, as it would not constitute an impermissible intrusion into the sphere protected by judicial independence. It appears that the use of artificial-intelligence systems as auxiliary instruments in judicial work is not hindered by the phenomenon already observed in practice, namely the so-called “automation bias,”⁷⁵ that is, an unwarranted trust in computer-generated outcomes. A machine’s error can, after all, be likened to the inevitable errors committed by judges in adjudicatory practice (the so-called “propensity for error”).⁷⁶ It is, however, essential—indeed obvious—those appropriate safeguards be put in place to ensure the correct functioning of AI tools, including safeguards preventing the identification of personal data of the parties, the status of the cases and the various incidents described in the files, in particular by prohibiting their unjustified processing beyond the scope of tasks necessitated by adjudication of the case.

The observation contained in Recital 61 of the Artificial Intelligence Act⁷⁷ is therefore well founded in the present circumstances, namely that “the use of AI tools can support the decision-making power of judges or judicial independence but should not replace it: the final decision-making must remain a human-driven activity.” This is, however, only the first step on the path toward the cooperation of artificial-intelligence systems in the administration of justice. The future is bound to take us by surprise anyway.

Abstrakt

„Antropocentryczny” system prawny nie zakłada dziś możliwości rozstrzygania spraw sądowych przez systemy sztucznej inteligencji. Jest jednak niemal oczywiste, że w niedalekiej przyszłości coraz bardziej zaawansowane narzędzia technologiczne będzie się włączać w sferę wymiaru sprawiedliwości w coraz szerszym zakresie. W tym kontekście pojawiają się już dziś fundamentalne pytania natury ustrojowej. Po pierwsze: należy postawić pytanie o to, czy ustrojowe normy konstytucyjne wymagają – a jeśli tak, to w jakim zakresie – udziału człowieka w rozstrzyganiu spraw z zakresu władzy sądowniczej.

⁷⁴ Einsatz von KI..., p. 10.

⁷⁵ G. Rühl, Einsatz..., s. 282; Einsatz von KI..., p. 11; A. K. Bernzen, Roboter..., p. 137; J. J. Vassel, Künstliche..., p. 183.

⁷⁶ G. Rühl, Einsatz..., *ibid.*; Einsatz von KI..., *ibid.*; A. K. Bernzen, Roboter..., *ibid.*

⁷⁷ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance), OJ L, 2024/1689, 12.07.2024.

Po drugie zaś: fundamentalne znaczenie dla oceny przyznania sztucznej inteligencji możliwości wykonywania przynajmniej pewnych zadań z zakresu wymiaru sprawiedliwości ma odpowiedź na pytanie, czy byłoby to dopuszczalne w świetle konstytucyjnego (a także prawnomiędzynarodowego) standardu prawa do rzetelnego procesu – a zatem do sądu należycie obsadzonego, ustanowionego ustawą – a wreszcie wobec prawa strony do bycia wysłuchaną w toku postępowania sądowego. Celem artykułu jest przedstawienie podstawowych problemów związanych z tymi zagadnieniami na tle obecnych standardów konstytucyjnych.

Słowa kluczowe: robot, sztuczna inteligencja (AI), prawo do sądu, sąd, wymiar sprawiedliwości.

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