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LegalTech 3.0. Some Reflections on the Constitutional Prerequisites for the Use of Artificial Intelligence in the Administration of Justice

[LegalTech 3.0. Kilka refleksji na temat konstytucyjnych przesłanek wykorzystania sztucznej inteligencji w wymiarze sprawiedliwości]

Abstract

New technologies are increasingly present in the administration of justice. Recognised for their effectiveness and diverse possibilities, they are becoming increasingly important tools to support the functioning of the justice system. Due to their continuous development, the idea has emerged in the scientific space that tools based on one of them – artificial intelligence – should no longer be used as merely supporting judges, but as those that could replace the judge in fulfilling his or her tasks. Shaping the judiciary in this way, with an algorithmic judge – for this is essentially what the proposal is aiming at – raises constitutional questions. Indeed, constitutional law to date has developed certain standards to which a modern court must conform. The fulfilment of these standards by artificial intelligence is debatable; the analysis devoted to it is the subject of the article. The Author's goal is to answer the question of whether constitutional law today is ready for artificial intelligence in the administration of justice.

Keywords: artificial intelligence, judiciary, courts, judge, algorithmic judge.

General Remarks

When it comes to the administration of justice and the implementation of the right to a court (to a fair trial),¹ efficiency of proceedings is an important value. In many legal systems, this is a major concern of the justice system.

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¹ P. Tuleja, *Kształtowanie się prawa do sądu w Polsce* [in:] S. Grodziski et al. (eds), *Vetera novis augere: studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi*, Kraków 2010, p. 1043ff.

Court proceedings are taking longer and longer, the number of cases is increasing and the scope of jurisdiction is widening. Therefore, it should come as no surprise that solutions to speed up the functioning of the courts are being sought worldwide.²

The experience of recent years shows that one of the solutions is the artificial intelligence included in the so-called LegalTech 3.0, serving no longer only as a tool to assist the judge, but also – which is increasingly boldly advocated – as a tool to decide cases.³ However, in individual legal systems, especially those with a strong constitutional tradition, a properly formed court as a component of the constitutional right to a court is a court with human judges.⁴ Thus, in spite of the technological possibilities, such substitutive administration of justice by artificial intelligence, consisting of autonomous adjudication of disputes between parties, is not universally accepted or is strongly contested.⁵ Indeed, technological developments have been so rapid in recent years that, among other things, they have created great distrust in certain sectors, one of which is precisely the judicial sphere. This distrust is probably still pervasive, which is part of a general tendency to downgrade the usefulness of artificial intelligence, questioning its capabilities or suitability for use where at first sight it would seem desirable.⁶ There are many sceptics, worried about the very rapid progress and the lack of legal or social tools to deal with the negative effects of the massive use of AI systems in all spheres.

This raises important questions about, among other things, the future of justice, the need for changes in the mentality of the public, trust in algorithmic justice or the possible constitutional changes needed to create the right conditions for the operation of modern justice using artificial intelligence, if at all possible in the future, on a large scale.

This article focuses on an analysis of the application of artificial intelligence in the field of justice and, in particular, in the exercise of the judicial function, based on an analysis of the constitutional configuration of judges' powers to seek judicial protection by citizens. Among other things, its aim is to answer the question of whether artificial intelligence, LegalTech 3.0, can be – in the light of constitutional standards – a tool used for the automatic adjudication of disputes.

² R. Susskind, *Online Courts and the Future of Justice*, Oxford 2019, *passim*.

³ M. Załucki, *Computers in Gowns and Wigs. Some remarks about a new era of judiciary?* [in:] L. M. Martin, M. Załucki (eds), *Artificial Intelligence and Human Rights*, Madrid 2021, p. 13ff.

⁴ T. Szanciło, B. Stępień-Załuca, *Sędzia robotem a robot sędzią w postępowaniu cywilnym w ujęciu konstytucyjnym i procesowym*, 'Prawo i Więź' 2023, vol. 47, 4, pp. 224–228.

⁵ Y. Razmetaeva, Y. Barabash, D. Lukianov, *The Concept of Human Rights in the Digital Era: Changes and consequences for judicial practice*, 'Access to Justice in Eastern Europe' 2022, vol. 5, 3, pp. 41–56.

⁶ A. T. Ester Sánchez, *El desafío de la Inteligencia Artificial a la vigencia de los derechos fundamentales*, 'Cuadernos Electronicos de Filosofia del Derecho' 2023, vol. 48, pp. 111–139.

Artificial Intelligence

Artificial intelligence is all around us and is already so commonplace that we often do not notice its existence.⁷ Systems that offer the most suitable product for our preferences show that artificial intelligence is omnipresent in our consumer behaviour. Similarly, we have intelligent navigation mechanisms that help us every day to find the shortest and fastest route to where we are going.⁸ From this unquestioning dependence on computers and other machines, the idea of autonomous technology has emerged to mimic human cognitive activity and replicate human behaviour.⁹ Since the mid-20th century, complex machines and sophisticated computer systems have emerged that mimic the natural and unique reasoning of human beings. Thanks to logical and mathematical processes, artificial intelligence processes and analyses data at dizzying speeds. It is also able to learn on the fly, which offers extraordinary opportunities for improvement, in the sense of improving its own system. The fear of artificial intelligence systems replacing humans in many professions causes great concern and rejection.¹⁰ The use of automation systems via artificial intelligence has already led to significant protests in various professional sectors on more than one occasion. Perhaps this is also the reason for the scepticism of some lawyers.

Meanwhile, the literature points to the desirability of using artificial intelligence in the legal services sector, including in the administration of justice.¹¹ However, this is no longer just about the use of technological mechanisms to speed up the search for jurisprudence or as a consultative tool for risk assessment in decision-making related to individual legal proceedings, but also as an automatic mechanism for judicial decision-making in which the human factor loses its leading role and is relegated to the background.¹² It is emphasised that the legal world should not distance itself from technological developments. Lawyers must participate in and benefit from technological advances. Huge social and legal changes are on the horizon due to the possible future widespread use of this technology. Indeed, as can be expected, the traditional, archaic and essentially conservative nature of the law will be transformed in the future as a result of the large-scale entry of artificial intelligence into the

⁷ L. Lai, M. Świerczyński (eds), *Prawo sztucznej inteligencji*, Warszawa 2020, *passim*.

⁸ H. Miranda Bonilla, *Algoritmos y Derechos Humanos*, 'Revista de la Facultad de Derecho de México' 2021, vol. 71, 280–2, p. 705 ff.

⁹ P. B. Marrow, M. Karol, S. Kuyan, *Artificial Intelligence and Arbitration: The Computer as an arbitrator — are we there yet ?*, 'Dispute Resolution Journal' 2020, vol. 74, 40, pp. 35–76.

¹⁰ E. P. Polo, *El Juez-Robot y su encaje en la Constitución Española. La inteligencia artificial utilizada en el ámbito de la toma de decisiones por los tribunales*, 'Revista de Derecho Público' 2024, vol. 72, 1, pp. 56 and 57.

¹¹ Y. Cui, *Shanghai Intelligent Assistive Case-Handling System for Criminal Cases – System 206*, Springer 2020, *passim*.

¹² M. Zalucki, *Computers...*, pp. 18–20.

legal world.¹³ And although, according to some, the ‘mechanisation’ of the judiciary is ‘a step before the world is ruled by machines’, because ‘humans will gradually lose their free will as they become increasingly dependent on technology’, and the presence of AI in the judiciary will displace the ‘human’ judge, limiting judicial discretion and the judge’s power to decide a case based on individual knowledge, judgement and experience,¹⁴ there seems to be no turning back from the use of AI in the judiciary.

Artificial Intelligence in the Judiciary – Selected Applications

As one might think, the impetus for basing the judiciary on new technologies came from, among other things, two high-profile incidents around the world specifically related to the use of artificial intelligence. In 2016, 584 cases pending before the European Court of Human Rights were subjected to an experiment involving artificial intelligence. The algorithm, after analysing the case documents, predicted 79% of the decisions of this court. These settlements concerned claims under Article 3 (prohibition of torture, inhuman and degrading treatment), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights.¹⁵ In contrast, in 2017, a similar test was conducted in the United States of America, among others. There, in turn, artificial intelligence analysed, on the basis of a created algorithm, more than 28,000 cases pending before the Supreme Court there. Cases decided between 1816 and 2015 were studied. The algorithm was able to predict 70.2 % of the decisions.¹⁶ In doing so, the spectrum of cases was much broader than the test for applying the standards of the European Convention on Human Rights to specific cases. It is therefore perhaps not surprising that the results of these experiments have resonated in the scientific space.¹⁷

The above experience with predictive systems (because this is the application of artificial intelligence that was used) shows that changes in the admin-

¹³ D. F. Engstrom, *Post COVID Courts*, ‘UCLA Law Review Discourse’ 2020, vol. 68, p. 246 ff.

¹⁴ S. Chen, *China’s Court AI Reaches Every Corner of Justice System, Advising Judges and Streamlining Punishment* [at:] <https://www.scmp.com/news/china/science/article/3185140/chinas-court-ai-reaches-every-corner-justice-system-advising> [accessed: 21.01.2025].

¹⁵ N. Aletras et al., *Predicting Judicial Decisions of the European Court of Human Rights: A natural language processing perspective*, ‘PeerJ Computer Science’ 2016, vol. 19, 2, p. 93ff.

¹⁶ D. M. Katz, M. J. Bommarito II, J. Blackman, *A General Approach for Predicting the Behavior of the Supreme Court of the United States*, ‘Plos One’ 2017, vol. 12, 4, *passim*.

¹⁷ M. Medvedeva, M. Vols, M. Wieling, *Using Machine Learning to Predict Decisions of the European Court of Human Rights*, ‘Artificial Intelligence and Law’ 2020, vol. 28, 2, pp. 237–266.

istration of justice are possible.¹⁸ New technologies have, moreover, already taken over the justice system. Just as simple solutions used to be applied in the past (so-called LegalTech 1.0), today probably no one can imagine further work in the judiciary without extensive legal information systems containing not only legislation, but also case law, commentaries and broad statements of doctrine and other instruments to support the work of judges (so-called LegalTech 2.0).¹⁹ All this, in the form of relevant data systematised in an appropriate way, is an important tool to support the judiciary. This trend will continue to grow, especially as it is predicted that around 2050, developments in technology will result in the average computer having more data processing capacity than the combined brains of all the inhabitants of the earth.²⁰ So there will certainly be a further transfer of information resources to the digital world, which will slowly replace the use of traditional tools. Will artificial intelligence replace judges? Does it have the aptitude to do so?

Questions posed in this way no longer surprise anyone today, and the answers seem obvious, at least at first glance. Indeed, examples of the use of artificial intelligence in individual legal systems in the judiciary are already widely known today.²¹ American law, Chinese law,²² but also the law of some European countries, have so far faced various challenges in this area, applying or testing the use of various solutions. The results are interesting in this respect, mobilising further research. Today, therefore, in many countries, the need for the use of artificial intelligence in the adjudication of certain categories of cases is being anticipated (artificial intelligence is to replace the traditional judge) and the various implications of this are being considered.²³

The use of an algorithm – for that is indeed what artificial intelligence is – could have, at least as it appears at first glance, significant advantages in the field of justice. It should be clarified here that an algorithm is a mathematical term that refers to an ordered and finite set of operations that, in turn, enable a solution to a problem to be reached. As is well known, AI systems use algorithms, using logical-mathematical operations designed by a computer engineer or programmer to process previously stored data in order to provide an answer to the question we want to solve with AI systems.²⁴ These questions may also relate to the law and serve not only to make a prediction, but also to

¹⁸ A. Garapon, *Les enjeux de la justice prédictive*, 'La Semaine Juridique' 2017, 1–2, p. 47.

¹⁹ D. Szostek (ed.), *LegalTech. Czyli jak bezpiecznie korzystać z narzędzi informatycznych w organizacji, w tym w kancelarii oraz dziale prawnym*, Warszawa 2021, *passim*.

²⁰ R. Susskind, *Online...*, p. 37.

²¹ H. Zhong et al., *Legal Judgment Prediction via Topological Learning*, 'Proceedings of the 2018 Conference on Empirical Methods in Natural Language Processing' 2018, vol. 1, *passim*.

²² K. Latek, „Roboty w togach” i rozprawy na WeChatcie? (!) Analiza przyczyn i sposobów wykorzystania nowych technologii w chińskim sądownictwie oraz charakterystyka zagrożeń z tym związanych, „Gdańskie Studia Azji Wschodniej” 2023, vol. 23, 1, pp. 224–240.

²³ E. P. Polo, *El Juez-Robot...*, p. 55ff.

²⁴ *Ibid.*

make a decision regarding the application of a specific legal norm in a predetermined state of facts. The role of the AI system technician in such a case is to translate the question concerning the application of the law into the language of the computer, creating as many mathematical equations as necessary.

Thanks to the tremendous evolution of the capabilities of today's machines, in a short period of time this technology is able to answer essentially any question asked about the application of the law. At the same time, this technology is so complex and advanced that it has the capacity to autonomously improve itself through its own action (self-learning).²⁵ This is because, in reality, AI systems learn independently. Artificial intelligence is thus able, for example, to detect jurisprudential patterns in order to automatically create models that offer predictions and even just make decisions, the subject of which may be the application of the law. It is therefore not just a matter of making a prediction as to how a case is likely to be decided by the courts, but of proposing the decision itself for a particular case. In doing so, these are constantly evolving processes that aim to deliver better results, which AI systems achieve through their own activity.²⁶

However, as pointed out in the doctrine, the algorithm often operates like a so-called 'black box', i.e. with great opacity.²⁷ Because of the huge amount of data it handles, and because the correlation detection and model-building operations used to process the data are so fast, it is not possible to explain the significance of the various factors used to generate a forecast or decision. This cognitive technology cuts through the data using artificial neural networks so quickly that we cannot identify the elements that led the machine to the final proposed result. Here, there is an element of mistrust in the computer system, and the lack of sensitivity of this system or the equivalent of life experience is raised, all of which are important in the fair adjudication of cases.²⁸

Therefore, as it is sometimes argued, in the context of AI case-handling, there is an 'apparent neutrality and objectivity' of AI systems, which gives rise to a number of controversies, particularly of a constitutional nature, as to the qualities that today's courts and judges are supposed to have.²⁹ Nonetheless, some suggest that in the future it is necessary to use AI to achieve the goal of deciding cases, and the first step should be, among other things, to select cases that have the capacity to be decided in this way. This seems tempting, especially in the context of the efficiency of proceedings, the elimination of case queues in courts, the acceleration of the functioning of the justice system. But

²⁵ M. Medvedeva, M. Vols, M. Wieling, *Using...*, p. 237ff.

²⁶ P. Książak, S. Wojtczak, *Toward a Conceptual Network for the Private Law of Artificial Intelligence*, Cham 2023, p. 53ff.

²⁷ D. F. Engstrom, *Post...*, p. 12.

²⁸ E. P. Polo, *El Juez-Robot...*, p. 60ff.

²⁹ *Ibid.*

is the justice system, especially its beneficiaries, an area ready for algorithms and algorithmic judges? This area can and should be looked at more closely.

The Right to a Court and Artificial Intelligence in Current Regulations

There is no doubt that the judiciary, in the course of several centuries of evolution, has developed a specific model for the organisation of the judiciary, which is now reflected primarily in the provisions of the fundamental laws, as well as in the subordinate legal regulations defining the system of the judiciary in a given state.³⁰ In order for the courts to function properly in the system of state organs, it is necessary to ensure respect and observance of the independence of the judiciary and the related independence and impartiality of judges, which is, *inter alia*, the duty of state organs.³¹

When looking at the various constitutional solutions, the relevant standards can be observed. They have been constructed in such a way as to ensure the independence of the judiciary exercised by people who, as judges, must enjoy the qualities of independence and impartiality, which is primarily related to procedural guarantees for the parties to judicial proceedings.³² There are, therefore, constitutional rules for the appointment of judges and, subsequently, for their exercise of judicial power and the settlement of disputes between parties.³³ These rules, it may be thought, are not, as of today, fit for the implementation of artificial intelligence as an element of judicial power, a tool for the exercise of judicial power, i.e. the adjudication of citizens' cases.

By way of example, it may be pointed out that according to the law in Poland, under the provisions of the Polish Constitution, the Republic of Poland is the common good of all citizens (Article 1), a democratic state governed by the rule of law, implementing the principles of social justice (Article 2), in which supreme power belongs to the Nation (Article 4[1] of the Polish Constitution). At the same time, the Constitution is the supreme law of the Republic of Poland (Article 8[1]) and the Republic of Poland observes international law binding upon it (Article 9). The system of government of the Republic of Poland is based on the division and balance of legislative, executive and judicial

³⁰ McNollgast, *Conditions for Judicial Independence*, 'Journal of Contemporary Legal Issues' 2006, vol. 15, 15, p. 106ff.

³¹ K. Olszak, *Niezawistość, niezależność i bezstronność w sądownictwie w świetle regulacji prawnych oraz orzecznictwa*, „Głos Prawa. Przegląd Prawniczy Allerhanda” 2019, vol. 4, 2, pp. 319–344.

³² P. Nihoul, *L'indépendance et l'impartialité du juge*, 'Annales de Droit de Louvain' 2011, vol. 71, 3, pp. 201–264.

³³ P. Bernier, *Analyse comparée sur la sélection et la nomination des Juges en régime parlementaire: éléments pour la constitution d'un «idéal type»*, 'Éthique Publique' 2011, vol. 13, 1, pp. 139–158.

powers (Article 10[1]). The latter, in turn, is exercised by courts and tribunals (Article 10[2] of the Constitution of the Republic of Poland *in fine*). In Polish law, courts and tribunals are a separate and independent authority from other authorities (Article 173 of the Polish Constitution).³⁴ The administration of justice in Poland is exercised by the Supreme Court, common courts, administrative courts and military courts (Article 175 of the Polish Constitution). The Polish Constitution provides for the existence of the National Council of the Judiciary of Poland [*Krajowa Rada Sądownictwa*], a body intended to safeguard the independence of the courts and the independence of judges (Article 186[1] of the Polish Constitution), the proposal of which is necessary for the appointment of a judge, which is made each time in Poland by the President of the Republic of Poland on the proposal of this Council (Article 179 of the Polish Constitution).³⁵

It follows, at least indirectly, from the above that if the Constitution talks about judges it is about humans. Polish law is silent on the possibility of someone other than a human being exercising judicial power, so in the current legal regulations – despite the occasional dissenting voices – there is no possibility of an artificial intelligence exercising judicial power and administering justice. In Poland, this is a competence constitutionally reserved for humans. It is currently they, as impartial and independent judges, who can exercise the administration of justice.

In Spain, on the other hand, it follows, for example, from the constitution there, which of course respects the tri-partite of powers, *inter alia*, that the jurisdictional power is vested in the judges and that the state – which has a monopoly of jurisdiction (Article 117 of the Spanish Constitution) is to ensure the right to receive effective protection of judges and courts in the exercise of their rights and legitimate interests (Article 24 of the Spanish Constitution).³⁶ The principle of the reservation of jurisdiction is enshrined in Article 117(3) of the Spanish Constitution and reserves exclusively to the courts and tribunals determined by law the exercise of jurisdictional power in all types of proceedings.³⁷ Only this type of body is able to judge and enforce what has been judged. The aim of the Constitution was to prevent other types of bodies, which carry out their work without the protection of the constitutional guarantees. In doing so, the Spanish judiciary is aware of a judicial council (General Council for the Judiciary – *Consejo General del Poder Judicial*) to which it entrusts certain functions, in particular with regard to appointment,

³⁴ B. Stępień-Załużka, *Sprawowanie wymiaru sprawiedliwości przez Sąd Najwyższy w Polsce*, Warszawa 2016, *passim*.

³⁵ R. Piotrowski, *Sędziowie i granice władzy demokratycznej w świetle Konstytucji RP*, „Ruch Prawniczy Ekonomiczny i Socjologiczny” 2018, vol. 80, 1, p. 215ff.

³⁶ J. L. Granda Alonso, *La autonomía judicial en el constitucionalismo español*, Madrid 2015, *passim*.

³⁷ I. Díez-Picazo Giménez, *Artículo 117* [in:] M. Rodríguez-Piñero y Bravo Ferrer, M. E. Casas Baamonde (eds), *Comentarios a la Constitución Española XL aniversario*, Madrid: Boletín Oficial del Estado 2018, pp. 646–670.

promotion, supervision and disciplinary responsibility (Article 122[2] of the Spanish Constitution).³⁸ Judges are thus appointed with the participation of the *Consejo General del Poder Judicial*, from which it also follows indirectly – as in Poland – that the legislator, when speaking of judges, means human judges, as only independent and impartial judges are entrusted with the provision of judicial protection. The idea of the algorithmic judge therefore also in Spain conflicts with the constitutional principles that define the judicial function. The Spanish constitution constitutes the jurisdiction as a human judicial system, designed for the people and managed by the people.³⁹

The situation is similar to that in the two countries mentioned above elsewhere in the world, although there are of course some attempts to change this. There is an ongoing discussion from which, however, as of today, no coherent concept (at least not yet) emerges for the placement of artificial intelligence in constitutional justice structures.

This does not mean that things could not be different in the future. It is possible to imagine, whether in Poland, Spain or other countries, such constitutional amendments that could lay the foundations for the constitutionally compliant administration of justice by or with the use of artificial intelligence. For this, however, it is necessary to build on (and possibly evolve) the existing standards of the right to justice, which, over the course of the development of the law in this area, have grown into international standards, rather widely accepted in many parts of the world.

The European Standard of the Right to a Court and the Future of Artificial Intelligence in the Judiciary

In this light, it must be recalled that the resolution of court cases is an indispensable element of the standard of the right to a court. This standard is often referred to as the so-called fair trial,⁴⁰ which is related to the case law appearing against the background of individual Constitutions (e.g. Article 45 of the Polish Constitution, Article 24 of the Spanish Constitution), but also – at least from the point of view of the European member states of the Council of Europe – to the views expressed against the background of Article 6 of the European Convention for the Protection of Human Rights and Fundamental

³⁸ L. M. Díez-Picazo Giménez, Artículo 122 [in:] P. P. Tremps, A. S. Arnaiz, C. M. Padilla (eds), *Comentario a la Constitución Española. 40 Aniversario. Libro-Homenaje a Luis López Guerra*, tomo 2, Valencia 2018, p. 1720ff.

³⁹ E. P. Polo, *El Juez-Robot...*, pp. 66–68.

⁴⁰ J. Daci, *Right to a Fair Trial Under International Human Rights Law*, 'South East European University Review' 2008, vol. 4, 2, p. 95.

Freedoms.⁴¹ It is primarily from this Strasbourg standard that one can read the necessity of ensuring a party's right to an independent court, formed by an independent and impartial panel of judges. This standard, in the context of the consideration of artificial intelligence, is primarily concerned with the right to a fair trial and the associated qualities of a court.

It should be made clear that the essence of the right to a fair trial is the concept of fairness of the judicial procedure, in accordance with the requirements of fairness and publicity, which consists in providing the parties with procedural rights adequate to the subject matter of the proceedings. In practice, this means that litigants must have a real opportunity to present their arguments and the court has a duty to consider them. This right has so far been correlated with, *inter alia*, the right to have the case heard by a 'duly seated' court, i.e. a court characterised by specific qualities.⁴²

According to widely accepted positions in democratic countries, an independent court is one in which, on the one hand, the judge has a sense of his or her independence and, on the other hand, in which the judge is perceived by the participants in the justice system as impartial.⁴³

At the moment, it seems that the algorithms used in practice so far, an algorithm acting as a judge, is not able to meet the above criteria (yet). In this respect, a number of doubts can be pointed out in relation to current solutions, without which the use of artificial intelligence systems as a substitute for a judge will be difficult, if not impossible, to resolve and guarantee in the future.

Firstly, it is about the judge's impartiality towards the case, the parties and the participants in the proceedings.⁴⁴ Impartiality establishes the obligation to objectively resolve the conflict without taking part in it, i.e. without any personal or professional connection with the parties or the subject of the

⁴¹ M. Kuijjer, *The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings*, 'Human Rights Law Review' 2013, vol. 13, 4, pp. 777-794.

⁴² A. Clooney, P. Webb, *The Right to a Fair Trial in International Law*, Oxford 2021, *passim*.

⁴³ M. Ch. Okpaluba, T. Ch. Maloka, *The Fundamental Principles of Recusal of a Judge At Common Law: Recent developments*, 'Obiter' 2022, vol. 43, 2, pp. 88-112. This translates into the requirement that a judge or anyone under a duty to decide anything must be impartial, which is, in turn, the foundation for the recusal of a judge in adjudication. This cardinal principle of adjudication has produced an abundant case law indicating the circumstances in which a judge should, or ought to, recuse him- or herself on the ground of bias or reasonable apprehension of bias in common-law jurisdictions. This article focuses on the fundamental principles guiding the notion of recusal in the common-law courts. There is, first, a presumption of judicial impartiality, which is the preliminary but important hurdle an applicant for recusal of a judge must overcome. The inquiry proceeds no further if this presumption is not successfully rebutted early in the proceeding. The second hurdle is the test for recusal that the facts put forward in support of the allegation of bias or apparent bias must meet. This test is a two-dimensional reasonable standard test of a reasonably informed observer who would reasonably entertain an apprehension that the judge would (not might

⁴⁴ Y. C. Sánchez, *La independencia de los jueces internacionales: análisis y valoración de las reformas adoptadas en el marco del Tribunal Europeo de Derechos Humanos*, 'Revista Electronica de Estudios Internacionales' 2021, vol. 12, 42, pp. 1-44.

dispute.⁴⁵ Traditionally, it stems from the judge's internal conviction, attitude or ethics. In the case of an algorithm, on the other hand, this impartiality will derive primarily from the statistics of the cases on which the algorithm has learned. While it is possible to envisage a tool that will be constructed in such a way as to formally realise the principle of impartiality, it is difficult at the moment to guarantee that the technicians-creators of the artificial intelligence system will not leave their views reflected in the system.⁴⁶ With this comes the risk of violating the impartiality standard, which, at least at present, is a barrier for which legislation has not (yet) found an apt solution.

Secondly, the same can in principle be seen in the context of the independence of the judge, as it does not seem entirely possible to separate artificial intelligence from the interference of other authorities.⁴⁷ This is due to the fact that in its creation, the algorithm has certain indications as to the methodology of conduct and may be susceptible to take into account biases imposed by the legislative or executive authority, in terms of, for example, higher criminalisation of certain groups of persons.⁴⁸ AI technicians can also smuggle their preferences into these systems. The necessary independence cannot, under current law, be extended to them; there are no adequate mechanisms for this. Judges, on the other hand, must be absolutely sovereign in the exercise of their judicial function. In exercising their authority, they can only be subject to the law. In this sense, one wonders whether it is possible for a data scientist or a whole team of professional programmers involved in the development of a system to develop an algorithm that is completely free of the influence of any of the three authorities. Artificial intelligence technology is developed by private entrepreneurs who do not necessarily operate transparently and whose product is protected by copyright. The employees employed by these entities are subject to the general labour system and therefore subject to the ideology, needs and organisational structure defined by their employer. As things stand, this seems to be a significant problem, precisely in the context of the possible independence of the algorithmic judge.⁴⁹ It is also a barrier that legislation must break out of in order to freely use artificial intelligence systems for the purposes described here.

Thirdly, it is difficult to speak of a judge's independence when it is to be based on the statistical conduct of a category of cases, as one would expect the conduct of an algorithmic judge to be.⁵⁰ For it must be borne in mind that each case differs from the others in details, but sometimes it is these details

⁴⁵ T. Szanciło, B. Stępień-Załucka, *Sędzia...*, p. 227.

⁴⁶ E. P. Polo, *El Juez-Robot...*, p. 68ff.

⁴⁷ L. Verzelloni, *El debate europeo sobre la independencia de la magistratura: la propuesta de la Red Europea de Consejos de Justicia*, 'Jueces para la Democracia. Información y Debate' 2017, vol. 88, p. 113 ff.

⁴⁸ T. Szanciło, B. Stępień-Załucka, *Sędzia...*, p. 228.

⁴⁹ E. P. Polo, *El Juez-Robot...*, p. 70ff.

⁵⁰ T. Szanciło, B. Stępień-Załucka, *Sędzia...*, p. 228.

that make it unique. A judge has a moral conscience, social experience, common sense and empathy. If the judge is a human being, there is a chance that he or she will notice these details, in the case of an algorithm such a chance is unlikely to exist, because its database will never take into account every possible factual situation, it will not realise the mechanism of human sensitivity necessary in this area.⁵¹ Meanwhile, the subjective and individual perspective of the judge, his/her feelings and sensitivity are essential elements at the moment when the judge decides the controversy. The intellectual operations carried out by the judge to apply the general law to a particular case are not automatic on the basis of his or her knowledge and experience, but on the contrary. The choice of the most just solution is a manifestation of the judge's commitment to society, to the legal system he serves. Indeed, the judge's decision represents his commitment of a specific nature to the parties and of a general nature to society as a whole. His or her decision resolves the conflict, providing the required judicial protection, all in a responsible manner, as the judge is accountable for his or her decisions. The artificial intelligence system, on the other hand, decides without the shadow of an emotional component.⁵² Artificial cognitive operations are performed in the complete absence of feelings and emotions. The algorithmic judge is unemotional, unmoved by what it perceives from the outside, because it perceives nothing from the outside, nothing that is not present in the databases that serve as sustenance. An artificial intelligence system offers its predictions or solutions based on the analysis of an infinite number of previous cases in similar circumstances, looking for patterns that it applies automatically. In this context, it is also possible to speak of a kind of barrier inhibiting the application of AI in the judiciary.

Finally, among the legal guarantees of judicial independence, the non-removal of judges deserves special attention.⁵³ The Constitution establishes the impossibility of dismissal, suspension or transfer except in cases expressly provided for by law. Thanks to irremovability, those exercising judicial power can exercise their function without fear that the direction of their decisions may affect their careers. In the context of artificial intelligence, it is difficult to have such guarantees, which also – at least *prima facie* – seems to be a significant obstacle that needs to be addressed (a new approach).

All these doubts, directed at algorithms known from practice so far, may constitute, at least for some time, a significant barrier to the introduction of changes in legal systems and the admission of artificial intelligence algorithms to administer justice. However, it is very likely that machines will continue to develop technically and will soon fulfil most of the expectations outlined above, as indicated by the results of AI functionality studies. It there-

⁵¹ E. P. Polo, *El Juez-Robot...*, p. 68ff.

⁵² *Ibid.*

⁵³ B. Stepień-Załucka, *Niezawisłość sądownictwa a niezależność sądów i niezawisłość sędziów*, „Przegląd Prawa i Administracji” 2011, vol. 85, pp. 135–159.

fore seems necessary to continue searching for the optimal solution, to create the optimal mechanism that would have a chance to gain the trust of citizens, which at the moment seems to be an extremely difficult task.

What Next? Some Comments Rather than Conclusions

There is no doubt that in the discussion on the future shape of the judiciary, the issue of new technologies is coming up more and more frequently and boldly, especially in the context of the opportunities and threats that these, for the judiciary, may bring.⁵⁴ In doing so, technological changes can already be seen in individual court procedures. In fact, the procedural rules have undergone significant transformations and the typically “analogue” court proceedings are already becoming “digital” proceedings. Since in the not too distant future it is envisaged that artificial intelligence may be used to adjudicate certain categories of cases where artificial intelligence is to replace the traditional judge, such possible transformations of court proceedings using artificial intelligence must raise questions about the standard of the right to a court and its satisfaction. After all, the efficiency of the judiciary is stimulated at various levels and the effect of various judicial stimulus measures is not always correct. Therefore, it is important to bear in mind that, when dealing with court cases, speed of proceedings should not overshadow other procedural guarantees of the parties.

As of today, machines have not been able to properly imitate human emotions in solutions known to the justice system. However, this may change soon, and new algorithms may solve this problem. In light of the very rapid development of this technology, the ability of humanoids to imitate human emotions will improve significantly in the near future, as research results indicate. Perhaps, for this reason alone, the use of artificial intelligence in the judiciary for the adjudication of cases should be postponed for some time, postponed, given a chance for this technology to improve. For, as one may think, the implementation of artificial intelligence for the purposes of dispute resolution is an inevitable matter, although it should be carried out in a gradual and slow manner, it seems, as gradually and slowly as possible.

⁵⁴ See e.g. report: Study on the Use of Innovative Technologies in the Justice Field. Final Report, Brussels 2020. See also the publications of R. Susskind, an Author who has been dealing with issues of new technologies in the work of lawyers for more than three decades, including: R. Susskind, *Tomorrow's Lawyers. An Introduction to Your Future*, Oxford 2017, and especially, *Online Courts and the Future of Justice*, Oxford 2019.

In turn, technological solutions will evolve – because they must – legal solutions, which this time, in order for the justice system to take full advantage of the technological possibilities, must be introduced in time, to keep up. The standards of the right to justice, as traditionally understood, must therefore evolve in this direction. What this should look like should be discussed in the near future, so as to try to outline a new framework for the standard of the right to court with algorithmic judges. Until then, the law will have to look at technological solutions, applying them on a large scale to date (*LegalTech 1.0* and *2.0*). However, the time will also come for *LegalTech 3.0*. For this to happen, the data feeding the AI system must be collected with great care, in a secure technological environment, with clear storage parameters,⁵⁵ and its future use must meet the same standards.

LegalTech 3.0. Kilka refleksji na temat konstytucyjnych przesłanek wykorzystania sztucznej inteligencji w wymiarze sprawiedliwości

Abstrakt

Nowe technologie są coraz częściej obecne w wymiarze sprawiedliwości. Dostrzega się ich skuteczność i różnorodne możliwości, stają się one coraz ważniejszymi narzędziami wspierającymi funkcjonowanie wymiaru sprawiedliwości. W związku z ich ciągłym rozwojem w przestrzeni naukowej pojawiła się idea, aby narzędzia oparte na jednej z nich – sztucznej inteligencji – nie były już wykorzystywane jako jedynie wspierające sędziów, ale jako te, które mogłyby zastąpić sędziego w wypełnianiu jego zadań. Takie ukształtowanie sądownictwa, z sędzią algorytmicznym – bo do tego w istocie zmierza ta propozycja – rodzi pytania natury konstytucyjnej. Dotychczasowe prawo konstytucyjne wypracowało bowiem pewne standardy, którym musi odpowiadać nowoczesny sąd. Spełnienie tych standardów przez sztuczną inteligencję jest dyskusyjne; poświęcona temu analiza jest przedmiotem niniejszego artykułu. Celem, jaki stawia sobie autorka, jest odpowiedź na pytanie, czy prawo konstytucyjne jest dziś gotowe na sztuczną inteligencję w wymiarze sprawiedliwości.

Słowa kluczowe: sztuczna inteligencja, sądownictwo, sądy, sędzia, sędzia algorytmiczny.

⁵⁵ There are even proposals in the doctrine to create a European agency to monitor the quality of artificial intelligence systems, as well as the strict application of data protection rules, which seems to be the next step in the discussion in this context. This could lead to greater public confidence in artificial intelligence tools.

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