



# Civil Procedure Review

AB OMNIBUS PRO OMNIBUS

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## Technology and fundamental rights in the judicial process

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**Abstract:** Before making intensive use of a means as relevant as AI in judicial processes, it is essential to reflect on its impact on fundamental rights. This paper presents a trilogy of rights that includes all the protection that the citizen must have before a court: independent judge, right of defense and right to res judicata. Through this trilogy the use of artificial intelligence tools is analysed. Some tools are already being used or could be used in the proceedings, in particular with regard to the automation of procedures, drafting of judicial documents, risk assessment in interim measures and evaluation of evidence. The objective is to achieve the compatibility of technology with the protection of our main protection as citizens.

**Keywords:** Artificial intelligence, independence, impartiality, defense, evidence, risk assessment

## 1. INTRODUCTION

In today's world, the discussion about technology can no longer simply refer to personal computers or other telematics such as GPS<sup>1</sup>. It is essential to address the use of a tool that while not new, has in recent years - after several unsuccessful attempts - experienced an unprecedented advancement. I am referring to artificial intelligence (AI), a tool that is invading many fields of everyday life, including justice<sup>2</sup>.

However, mixing AI and justice is not very easy, despite the efforts of the Council of the European Union<sup>3</sup>. It is not simply a matter of talking about AI and courts or AI and statute law, though both topics open up interesting fields of research. When these areas are approached, a huge philosophical gap<sup>4</sup> emerges, preventing us from proceeding further.

This gap challenges the very concept of justice, though superficially, and must overcome doctrinal controversies, to determine what contours AI must invariably respect. We should not let AI allow the same type of disaster that has occurred in other areas such as electoral processes, a paradigmatic example being the United States election of 2016. If we do not correctly mark the boundaries that AI must respect in terms of justice, the foundations of our society will be completely altered, and perhaps not for the better.

As Michele Taruffo<sup>5</sup> recognized, fair judgment occurs when the facts have been correctly ascertained, the law has been properly applied, and due process of law – that

- 1 See Greenberg, E. E. / Ebner, N., "Strengthening Online Dispute Resolution Justice", 19-0032, 7-8-2019, <http://ssrn.com/abstract=3434058>. About the e-Justice projects of the European Union, see Covelo de Abreu, J., "The Role of Artificial Intelligence in the European e-Justice Paradigm – Suing Effective Judicial Protection Demands", in Moura / Novais / Reis ed., *Progress in Artificial Intelligence*, Springer 2019, p. 299. Biard, Alexandre, "Online justice or new Far Www.est? The difficulty of regulating alternative dispute resolution on online platforms", *Revue internationale de droit économique*, 2019/2 (Vol. XXXIII), p. 165-191.
- 2 See Bonet Navarro, José, "La tutela judicial de los derechos no humanos. De la tramitación electrónica al proceso con robots autónomos", *Revista CEFLegal*, n. 208 (May 2018), p. 77. Corvalán, J.G., "Inteligencia artificial: retos, desafíos y oportunidades – Prometea: la primera inteligencia artificial de Latinoamérica al servicio de la Justicia", *Revista de Investigações constitucionais*, April 2018, p. 295. Re, R.M. / Solow-Niederman, A., "Developing Artificially Intelligent Justice", 22 *Stan. Tech. L. Rev.* 2019, p. 242. Giampiero, L., "Regulating (Artificial) Intelligence in Justice: How Normative Frameworks Protect Citizens from the Risks Related to AI Use in the Judiciary", *European Quarterly of Political Attitudes and Mentalities*, 8(2), 2019, p. 75, <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-62463-8>. Rigano, C., "Using Artificial Intelligence to Address Criminal Justice Needs", *NIJ Journal*, n. 280 January 2019, p. 1. CUI, Y. *Artificial Intelligence and Judicial Modernization*, Springer 2020. Wischmeyer e.a., *Regulating Artificial Intelligence*, Springer 2020.
- 3 See European Commission for the Efficiency of Justice (CEPEJ), *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, Adopted at the 31<sup>st</sup> plenary meeting of the CEPEJ (Strasbourg, 3-4 December 2018), p. 7. <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>.
- 4 See Binns, R., "Human Judgement in Algorithmic Loops; Individual Justice and Automated Decision-Making", 2019, <https://ssrn.com/abstract=3452030>.
- 5 Taruffo, M., "Idee per una teoria della decisione giusta", en *Verso la decisione giusta*, Turin 2020, p. 360.

is, the procedural rights of the parties – has been respected. These three fundamental pillars, or three conditions, must therefore be met. While the first two pillars are affected by AI, they are addressed in a separate study<sup>6</sup>. In the present work, I will focus on the third pillar, the notion of justice and respect for fundamental rights in the procedural sphere.

The question I will explore is very simple: what impact does AI have on procedural rights? Despite its simplicity, the answer is undoubtedly much more complex.

## 2. THE STRUCTURAL TRILOGY OF PROCEDURAL RIGHTS

The exposition of the rights that are relevant in procedural matters does not have a doctrinal unity, nor even a certain uniformity. Explained throughout history with various brocards and principles – *audiatur et altera pars, iudicium est actus trium personarum, secundum allegata et probata*<sup>7</sup>, *ne eat iudex ultra petita partium, nemo iudex sine actore, nemo iudex in causa sua*, lawful judgment<sup>8</sup>, etc.–<sup>9</sup> but formulated for the first time in a somewhat more systematic way, fundamentally in amendments IV, V and VI of the US Constitution –with the addition of amendment XIV.1–. Such tenets have passed through various catalogues of rights around the world with greater or lesser influence, displaying a wide range of aspects that should be considered in the so-called due process of law today. The result is a scattered array of rights and guarantees that should be respected in the process<sup>10</sup>. In analysing its content, this extensive list can be organized into three main categories: the right to an independent judge, the right to defense, and the right to *res judicata*.

The first right includes the independence of the judge with respect to the powers of the State. It includes the right to a tribunal established by the law, but also allows study under its content some aspects that affect the autonomy of the judicial function

6 Nieva-Fenoll, J., *Inteligencia artificial y proceso judicial*, Madrid 2018.

7 Durandus, *Speculum iuris*, Venetia 1585, Parte II, *De Sententia*, § 5, 1. p. 784-785, with the antecedent of Azo, *Brocardica (aurea). sive generalia iuris*, Basilea 1567, rúbrica XX, p. 237: *Iudex debet ex conscientia iudicare, & econtrà.] Secundum allegata iudicare debet. Cum quaeritur, an iudex debeat iudicare secundum conscientiam suam, in causa civili vel criminali, distingue: utrum notum sit ei tamquam iudici, id est, ratione officii sui: an ut privato. In primo casu fertur sententia secundum conscientiam suam; quae etiam potest dici allegatio. ut ff. de ser. l.2.&ff. Si fer. vend.1 surreptionem. & de minor. 25. anno.l.minor. Quid miri? nonne sert sententiam, secundum testificationes & confessiones, quas novit ut iudex? & et ita potest intellegi hoc generale. Si vero novit ut privatus, non debet ferre sententiam secundum conscientiam suam, sed secundum allegata. & ita intelligitur contraria Rubrica.*

8 This precedent (*legale iudicium*) of the Magna Carta Libertatum of 1215, points 39, 52, 56 and 57, is particularly interesting. It is possibly influenced by the Azo *secundum allegata et probata*, but terminologically it has curious references in Germanic Law: *Sachsenspiegel*, art. 16 y *Liber iudiciorum*, Lib. II, Tít. I, XVIII.

9 On these and other principles, see Nieva-Fenoll, *Derecho Procesal I, Introducción*, Valencia 2019, p. 40.

10 Regarding it and its historical background, I refer to what was discussed in Nieva-Fenoll, *Derecho Procesal I, Introducción*, p. 79.

and that would be difficult to place in the area of independence or impartiality, such as the influence of the media, networks, or even the *communis opinio* of their colleagues in the judicial establishment; in general, all aspects that may influence the emotions of the judge and prevent objectivity<sup>11</sup>. Thus, since impartiality means dealing with emotions – affection or hatred<sup>12</sup>–, the right to an impartial judge is included within this right to an independent judge. A judge must be isolated from both external influences as well as their own emotions when it prevents them from making a fair judgment.

The right of defense includes all the guarantees that allow people to present their point of view with the reasonable expectation of winning a process. This obliges the authorities to provide free access to the courts, including, minimally, the publicity of the proceedings, the possibility of rectification of the errors of the parties – and therefore, the exclusion of formalism, which is nothing more than a form of authoritarianism – and judicial action without undue delay that renders the defense useless if the tribunal comes too late. The right to formulate allegations, to present evidence and to contradict the positions of the opposing party is also included. Likewise, the right to the motivation of judicial decisions and their enforcement, the right to appeal, and the right to equal parties and legal assistance is incorporated. If any of that content is missing, the defense is no longer efficient, and meaningless.

Finally, there is the right to *res judicata*, that is, the prohibition of repeated judgments<sup>13</sup>, whose oldest precedent is found in the code of Hammurabi<sup>14</sup>. It is not admissible to have judgements that lack stability. For this reason, the *non bis in idem* must be valid in any process, not only in the criminal one.

With all the rights exposed, let us now examine how the introduction of AI in the processes can affect them.

### 3. THE RIGHT TO AN INDEPENDENT JUDGE: INDEPENDENCE AND IMPARTIALITY

As outlined in the previous section, until now judicial independence has referred to the isolation of the judge from external influences on his person. Thus, the concept of impartiality, usually explained separately, has very different areas of evident contact

11 See Forza, Antonio / Menegon, Giulia / Rumiati, Rino, *Il giudice emotivo*, Bologna 2017.

12 All causes for disqualification have this background, as can be seen by reading any catalogue. See art. 219 of the Organic Law of the Spanish Judicial Power or arts. 41 and 42 ZPO.

13 See Nieva-Fenoll, *La cosa juzgada*, Barcelona 2006, p. 119.

14 Part VI, § 5: “If a judge has tried a case, pronounced sentence (and) deposited the sealed document, if, then, he changes his decision, it will be proven that the judge changed the sentence he had handed down and will pay up to twelve times the amount of what he motivated the cause. Furthermore, publicly, he will be made to rise from his seat of justice (and) he will not return again. He will never again be able to sit with the judges in a process.” See Lara Peinado, F., *Código de Hammurabi*, Madrid 1997, p. 7.

with that of independence, and they are in fact part of the same content. Partiality almost always supposes affection or hatred in the judge for various reasons, in essence. In the background of the lack of independence, however, the emotions of the judge are also to be found since the influence of State powers, factual powers, journalists, or networks is studied under its content, and that emotional influence is equally clear and even more varied by including emotions such as fear. Be that as it may, all of this simply seeks to achieve objectivity in judicial decisions.

By thinking of the judge as a person in formulating these contents, we have until now not had to consider the judge as a machine. In an AI context, does it make sense to speak of an independent judge when a machine, by definition, does not feel emotions? Emotions<sup>15</sup> are a biological survival mechanism that are inconceivable in a machine. They make the human being tend to what his brain perceives, based on their genetic information and life experience, as suitable for the maintenance of life and lead them to move away from what is threatening. This is inconceivable in a machine because of its total lack of self-awareness. Software may be programmed to have automatic defense mechanisms, but it will never feel fear, love, pity, or remorse, and therefore it will not panic or suffer from addictions. This is why that HAL from Kubrick's *2001: A Space Odyssey* was so human, and not really artificial.

To answer the question of whether the concept of independence remains valid in an AI context, two possible scenarios must be formulated: AI assisting the human judge, or AI completely replacing the judge.

The first is already a reality, with AI helping the judge to make the final judicial decision. AI programs such as case law search engines, or more advanced programs that predict risk, such as COMPAS<sup>16</sup> in the US or HART<sup>17</sup> in the UK<sup>18</sup> are still weak in terms of power; in all cases, the machine simply makes a proposal.

With search engines, the judge will search for case law on a subject and the program selects the cases using an algorithm that qualifies them as relevant, excluding others that are left in second place. Usually, the program works by keywords, but it also has thematic searches that can further guide the judge's decision, resulting in the selection being not a simple accumulation of cases that the judge can read to be well informed, but rather the selection of the program that can lead the judge to a certain decision, ruling out other alternatives. In this way, it is possible that a minority of cases is left

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15 Hogarth, Robin M., *Educar la intuición. El desarrollo del sexto sentido*, Barcelona 2002, p. 89. Hülstoft, Thomas, *Emotionen*, Munich 2006, p. 14.

16 Correctional Offender Management Profiling for Alternative Sanctions. See the questionnaire on which it is based in <https://www.documentcloud.org/documents/2702103-Sample-Risk-Assessment-COMPAS-CORE.html>, as well as its user manual in Northpointe, Practitioner's Guide to COMPAS, 17-8-2012.

17 Harm Assessment Risk Tool.

18 Giampiero, L., "Regulating (Artificial) Intelligence in Justice: How Normative Frameworks Protect Citizens from the Risks Related to AI Use in the Judiciary", p. 81.

in the background or underread, which will favour its disappearance. Of course, the algorithm could also favour the opposite, with a minority opinion growing artificially and becoming widespread.

While the simple search for case law already poses some complexity, in a stronger AI tool, such as that used for the prediction of the risk of criminal recidivism, e.g. COMPAS and other similar tools, we find that the way AI guides the judge can be even more precise. COMPAS selects 137 items<sup>19</sup> from a convicted person to try to qualify that person by variables as sensitive as place of origin, social environment, or even political opinions. In making a risk prognosis, such tools qualify human beings in a Manichean way, and thus incline the judge to see a greater danger in people than if a correct evaluation of the facts or judgement were being made.

In other words, it is perfectly possible that an AI tool would validate common social aversions<sup>20</sup>, that is, negative emotions towards certain groups, thus stabilizing and reinforcing a simple social prejudice in an extremely dangerous manner. Imagine the risk that would arise if the judge were to use the tool not only to assess the risk, but to help in evaluating the responsibility of the defendant in a crime.

The obvious danger is that judges, even when aiming to be independent, have a very powerful tool that can condition their judgment. The judgement would in effect not actually be drawn up by the judge, but rather by whomever sets the algorithm of the tool, a rather dangerous scenario<sup>21</sup>. The series of guarantees to safeguard a judge's independence do not exist for any computer professional, much less in the executive branch that hires that professional.

What would happen if instead being helped by the tool, the judge is completely replaced by it? A substitution could take place for processes that are very simple, such as processes with no opposition, including evictions or payment by summons proceedings. In these cases, danger is minimal because they involve substantially identical issues that the individual judge always resolves in the same way using a very bureaucratic method. But a more complex substitution process could also be introduced for a certain type of claim that is frequent. Currently, judges already classify the processes in this way when preparing judgments, especially when they incorporate some passages of the motivation that they already have prepared in advance in the drafting of the decision. A paradigmatic – and somewhat frightening – example of this is provisional detention and its usually repetitive motivation. The problem already detected in simple assistance tools would be aggravated and systematized in a situation of total replacement.

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19 Northpointe, Practitioner's Guide to COMPAS, 17-8-2012, p. 23.

20 Chiao, V., "Fairness, accountability and transparency: notes on algorithmic decision-making in criminal justice", *International Journal of Law in Context*, 2019, 15, p. 126.

21 That was precisely the problem that was somehow left aside in *State v. Loomis* 881 N.W.2d 749 (Wis. 2016). See Tashae, Jason, "Risk-Assessment Algorithms Challenged In Bail, Sentencing And Parole Decisions", *ABA Journal*, March 2017, [http://www.abajournal.com/magazine/article/algorithm\\_bail\\_sentencing\\_parole](http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole).

Theoretically, it is precisely in certain scenarios where independence and impartiality are identical that AI comes into play; given the lack of emotions, the possibility of external influences on the opinion of the machine would be non-existent. Certainly, this is incontrovertible. But it is necessary to go a little further and assume that with AI we must not imagine the artificial characteristics that we have seen in so many films, that deep down they are humanlike, even if we are led to believe otherwise. Rather, it is a tool that when receiving external influences like those that can be exerted on a judge, it will not change its judgement at all due to lack of any opinion, emotion, or prejudice. The decision is simply made by following the algorithm, and any external influence is therefore unimaginable. A person might fool the machine with misinformation, but obviously any action that seeks to generate an emotion will have no effect on it.

In this situation, it is not so much the judge that ought to be controlled, but the IT professional who develops the algorithm. This has many drawbacks but also some advantages. On one hand, an undemocratic power such as a company – either private or public – could become the owner and manipulator of our justice system, despite any guidelines given by a government, or even the judiciary itself. But one advantage could be that AI might enable better law enforcement.

### **a. AI, emotions, and compliance with the law**

In an imagined scenario, AI could make judicial decisions without the emotions of a judge, but with the emotions of the algorithm programmer. This would have the disadvantage of not making the machine as theoretically controllable as the judge, who is guided by the checks and balances of the legal system in place for this purpose.

But let us suppose that thanks to the democratic mechanisms established for the appointment of the judge<sup>22</sup>, the programmer is determined to be neutral, and therefore does not reflect the emotions typical of this person in the elaboration of the algorithm. In that case, the algorithm would simply collect what is ordered by the legal system. However, the AI tool would not be free of those emotions; laws reflect the emotions of their legislators, defending what they consider to be fair. Essentially, laws are not neutral, but rather the product of what human beings who are more or less democratically represented consider fair at a specific moment in history. I will comment more on this point in the next section.

The idea that AI can enforce the application of the law in a strict manner, without nuances, even taking into account the ideas put forward by the legislator in the legislative iteration that are so often forgotten because of the very extensive compilations of parliamentary debates, is interesting. The greatest positivists, Montesquieu<sup>23</sup> and

22 See Nieva-Fenoll, *Inteligencia artificial y proceso judicial*, p. 121.

23 Montesquieu, Barón de, (Charles-Louis de Secondat), *De l'esprit des lois*, reed. of Paris 1748, Paris 1979, I, p. 301.



Bentham<sup>24</sup> being among the most influential, would most likely be pleased to see that type of judge at last, a mouth that pronounces the words of the law without adding anything else.

The positive side of this would be that the law would not be manipulated *a posteriori*, as sometimes happens, but rather always be applied with its original intention. If the operation were carried out at a global level throughout the legal system, the law would always be applied in the same way, thus efficiently imposing the moral or collective behaviour that the legislator had wanted. What is so feared in the application of the law by a machine would suddenly be desirable; we would no longer wait for what each judge thinks or says, and the judicial decision would be foreseeable. This would undoubtedly avoid the conflicts that so often occur when trying one's luck before the court and taking advantage of its deficiencies, as well as the logical differences of opinion among judges. In this way, AI would no longer be a danger, but rather an essential guarantee of compliance with the rules.

The problem is that laws cannot be static in the way that several religions and more than a few dictators<sup>25</sup> have imagined. They must adapt to the times, or end up sending Galileo Galilei to the fire, and for this the work of the judge is essential. In their mission to analyse the specific situation in which the rule is to be applied, they must observe the nuances of that situation and determine the best application for it. While this makes the application of the law less predictable than what a mathematician would accept or what an AI programmer would imagine, it is precisely what will guarantee that the law does not enter as a foreign body into people's lives, but reasonably regulates their coexistence.

## **b. AI as a reflection of social empathy: What about justice?**

It is worth wondering whether it would be possible that one day AI could determine the general feeling of the population and what they are empathic to at a certain moment, which, after all, is what justice tries to reflect.

At present, we are served by a more static operator, the legislator, who collects supposed social consensus on what is appropriate at all times and we recommend citizens to comply with it, even if they may not agree, provided that the public power behaves according to the mandate that the citizens gave it at the polls. Hence, keeping electoral promises is very important, as is the essential prudence that should inspire making them. In addition, given that the law does not always apply by itself – despite the recommendations to obey it – nor can it provide for all the specific cases in which it is called upon to apply, we need the judge. That judge, with the help of the legal text,

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24 Bentham, J., *Introduction to the principles of morals and legislation*, London 1823 (1. ed. 1780), p. 272.

25 See the word “immutable” in section VII of Decree 779/1967, of April 20, which approves the consolidated texts of the Fundamental Laws of the Kingdom of Spain. BOE n. 95, of April 21, 1967, p. 5250.



will act as legislator in each concrete situation, state what must be done, and settle the conflict that arises in the process dictating the rule applicable to that situation.

This is the system that has worked so far. We trust that the democratic system will provide a legislator who reflects our feelings and way of thinking in the rules, and we hope that the judge, as a member of our community, will carry out their work by applying empathy, or equity, by trying to truly hold on to it and not to other emotions that they may feel individually. That is why we require judges to be independent.

Perhaps one day AI can go further, however. Today it is already quite easy to determine what the majority of the people think in a specific case thanks to social networks and the opinion studies that politicians rely upon. Until now, we have counted on the judge to proceed with the application of that social sentiment, combining it with knowledge of the law, thus making the judge a sort of representative of the social consensus that guides our species to live together. We perceive their decisions to be unfair when they depart from that social consensus.

If in the future it were possible for AI to capture in real time what people feel and also had the content of the legal system included in its algorithms, it could condense the concept of justice that we have been following from the start: a correct application of the laws to well-established facts while respecting fundamental rights<sup>26</sup>. This would also provide the advantage that judgment would not be biased, with some element of the proposition weighing more than the other. In some situations, citizens want the facts or the law to be manipulated to produce the sentence they consider fair, while in reality it is unjust. This is something that happens regularly in the criminal process.

This scenario would be impossible with a machine unaffected by such social influences. While capturing social sentiment, it would only apply it in a judgment if the facts were not falsified or the will of the legal norm was not distorted. We would have, at last, a fair judge, and reached that desired end that we continuously struggle to define accurately: justice.

If the algorithm, which would be rather complex, is configured incorrectly, a danger arises. Initially, it would emerge as a tool to support the judge, pointing out the alternatives of the rule to the factual situation evaluated with the help of another artificial intelligence tool, evaluating the evidence presented in the process. Finally, the eventual social acceptance of the judgment would be communicated, proposing various meanings. Would that be better than what until now we have called the common sense of a judge<sup>27</sup>, *Erfahrungssätze*, or maxims of experience<sup>28</sup>,

26 Again, Taruffo, M., "Idee per una teoria della decisione giusta", en *Verso la decisione giusta*, Turin 2020, p. 360.

27 See the "buon senso" de Beccaria, Cesare, *Dei delitti e delle pene*, reed. of Acquarelli de Bussolengo 1996, de la ed. de 1764, p. 45. See also Blackstone, William *Commentaries on the Laws of England*, Lib. III, Philadelphia 1867, p. 290-291.

28 Stein, Friedrich, *Das private Wissen des Richters*, Leipzig 1893, p. 14-15.

moral certainty<sup>29</sup>, *sana critica*, or sound criticism<sup>30</sup>, or *intime conviction*, or intimate conviction<sup>31</sup>?

The individual judgment of each judge is always variable and insecure. On the other hand, what AI proposes would be predictable and, in any case, duly motivated, even with statistical support. It is not a question of thinking about whether this would be better or worse because it is obvious that in scientific terms it would be better; suddenly, judicial ruling would become completely objective. It would seem less human, even though AI is clearly human, having been built by humans. But the world would quickly get used to the situation, and possibly even lead to the drafting of laws, making popular consultations and referendums unnecessary. If the machine is capable of truly determining what the people are thinking, something as static as the law is unnecessary.

One day soon we will have to make the decision on whether we want that world. Human opinion is volatile and fickle, and a constantly changing orientation may not be operational. It is possible that a certain stability in the social will may also be considered fair, just as now we do not constantly hold referendums on the same matter.

Despite the fact that AI will be able to identify in real time what seems right to us, it is quite probable that we will respect the old stability that the law gave as an expression of the general will in the past, and we will program the algorithm of justice to decide in a certain sense from a certain time, at least until a consensus is reiterated, constant and stable. Ultimately, this is the same thing a politician does when considering a change in the law. They usually expect a social consensus on the matter, and when they believe that it concurs and is stable, they proceed to initiate the legislative procedure. So will it be in the future, perhaps.

In such a situation of extreme AI development, the role of the judge will be considerably reduced to that of guarantor of the correctness of the algorithm. The judge will have to observe if the perception of the machine coincides with their own and report a malfunction if this is not the case. This may induce some kind of mental laziness<sup>32</sup> that will have to be avoided through stimuli and mechanisms that obligate them to think in the future.

29 Llobell Tuset, Joaquín, *La certeza morale nel processo canonico matrimoniale*, en: “Il Diritto Ecclesiastico”, 109/1, 1998, p. 771. See also Aliste Santos, Tomás-Javier, *Relevancia del concepto canónico de “certeza moral” para la motivación judicial de la “quaestio facti” en el proceso civil*, *Ius ecclesiae*, Vol. 22, n. 3, 2010, p. 667-668.

30 Reglamento sobre el modo de proceder el Consejo Real en los negocios contenciosos de la Administración de 30-12-1846 (Gaceta de Madrid 21-01-1847, nº 4512, p. 1), art. 148. Carmignani, Giovanni, *Teoria delle leggi della sicurezza sociale*, t. IV, Pisa 1832, p. 76.

31 Arts. 312 and 342 of the french *Code d’instruction Criminelle* of 1808.

32 See Calamandrei, Piero, *La Cassazione civile*. Vol II. Milan 1920, en: “Piero CALAMANDREI, Opere Giuridiche, Vol. VII, 1976”, p. 67.

## 4. THE RIGHT OF DEFENSE

The plural content of the right of defense has already been explained previously<sup>33</sup>, and in fact illustrates a beautiful and detailed summary of our idiosyncrasy and culture, and how throughout history we have conceived processes to make them seem fair in the sense that one could be certain that the judge had listened and taken into account what was said. Hence, its most archaic formulation<sup>34</sup> is precisely the principle of a fair hearing, which is, in fact, the broadest and most intuitive rubric of this right.

However, it is precisely because of these historical reasons that much of its content only makes sense taking into consideration the figure of the judge as a human being. Most of that content is aimed at remedying the judge's weaknesses, not in terms of emotions, but rather by capturing their full attention in order to have them best resolve a case by listening carefully to the information provided by the parties.

Something like this is inconceivable in a machine, which is attentive by default and never gets lost, and this is why this perspective is so interesting. Beyond all the tools that already exist to help a judge to assess evidence or motivate, let us imagine the situation presented in the previous section, one in which the judge is itself a machine.

### a. Free access, allegations, evidence, conclusions, and enforcement

A good part of the very important and traditional guarantees of the right of defense are left behind almost definitively with AI, and therefore the following explanation will be brief.

All claims would be accepted without formal obstacles, complying only with the requirements established by the application that sometimes, as we already know from many flight contracting websites, among others, can be a bit bureaucratic. Such bureaucracy is very human and would disappear quickly, however. What the machine would do is locate us in a system in which we are already fully identified, and it would proceed with our request, without further ado, transferring the request to the opposite party, who is also identified and located automatically. The entire process would be so public that it would be accessible online for anyone to verify its regularity. And it would be executed immediately, making undue delay unimaginable.

The allegations of the parties would be registered and the evidence – mainly documents, including multimedia documents and expertise – would be automatically evaluated, verifying that they confirm or deny what the parties have stated, and in the

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33 Section 2.

34 Numbers 35:12: *"The cities will be for you as a refuge from the avenger, so that the murderer does not die until he appears before the congregation for judgment."*, or Demosthenes, *Contra Áfobo*, I, 2-4.

case of expert evidence, accrediting in an automated way the *Daubert*<sup>35</sup> criteria, to which more checks or items would likely be added in the future to complete them<sup>36</sup>. It is very likely that the testimony of the parties would disappear from the civil process because it is a simple repetition of what was said initially by the lawyers and because it is impossible to truly determine whether a person is lying or not, even within the parameters of the psychology of testimony<sup>37</sup>.

For the same reason, witnesses would be exceptional, as indeed they are becoming more and more irrelevant in the systems where there is no jury. They made sense at a time when the truth had to be proven this way due to lack of documentation or lack of credibility of those documents. Today, witnesses are mostly expendable. This is true even in the criminal process, since in the face of the avalanche of technological evidence – again, documentary and expertise – crimes are seldom ascertained by the credibility of the witnesses, which is always very precarious. Credibility analysis may be reserved exclusively for victims, and it is very likely that it is not judges who value the testimony, but psychologists through cognitive interviews and personality tests.

The same can happen with defendants in the criminal process. The risk is that they are evaluated not by the acts for which they are accused, but rather by their personalities, as occurs with COMPAS, which should be avoided in any case since no one can be condemned for how they are supposed to be, but because of what they actually did. We cannot fall into a situation analogous to the film *Minority Report* in which crimes were prevented before they were committed by predicting what actions people were going to take.

For this reason, the possibility – never the obligation – of the defendant to provide defense evidence must always be respected. The validity of the presumption of innocence, initially conceived to keep judges away from the social prejudice of guilt<sup>38</sup>, that is, to guarantee their independence, must remain essential. But it also plays a role

35 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). See also Rule 702. Testimony by Expert Witnesses of the Federal Rules of Evidence.

36 See Vázquez, Carmen, *De la prueba científica a la prueba pericial*, Madrid 2015, Nieva-Fenoll, “Repensando Daubert: la paradoja de la prueba pericial”, en AAVV, *Peritaje y prueba pericial*, Barcelona 2017, p. 85, and before Dondi, Angelo, “Paradigmi processuali ed ‘expert witness testimony’ nel diritto statunitense”, *Rivista Trimestrale di Diritto e Procedura Civile*, 1996, p. 261, Auletta, Ferruccio, *Il procedimento di istruzione probatoria mediante consulente tecnico*, Padua 2002. Ansanelli, Vincenzo, *La consulenza tecnica nel processo civile*, Milan 2011, Taruffo, Michele, “Prova scientifica e giustizia civile”, en AAVV, *Giurisprudenza e scienza*, Rome 2017, Bardi Edizioni, p. 241. Faigman, David L., “The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science”, *Legal Studies Research Paper Series*, n. 19, 46 *UC Davis Law Review* 2013, p. 104. Fournier, Lisa R., “The *Daubert* Guidelines: Usefulness, Utilization, and Suggestions for Improving Quality Control”, *Journal of Applied Research in Memory and Cognition*, 5, 2016, p. 308. Haack, Susan, *Evidence Matters*, Cambridge 2014, p. 121.

37 Manzanero, Antonio L., *Psicología del testimonio*, Madrid 2008. Diges, “La utilidad de la psicología del testimonio en la valoración de la prueba de testigos”, *Jueces para la democracia*, n. 68, 2010, p. 51. Mazzoni, Giuliana, *Psicologia della testimonianza*, Rome 2015.

38 See Nieva-Fenoll, *La duda en el proceso penal*, Madrid 2013, p. 75.

in evidentiary matters that becomes more relevant when the use of AI could lead to the temptation to judge subjects only by aversion to their personalities. In this situation, independence must be ensured in programmers, and the propensity that they have to condemn because of risk forecasts<sup>39</sup> must be avoided. The presumption of innocence fulfils its mission precisely in this situation, and will potentially become more prevalent with AI risk prediction programs if we fail to effectively override them first.

The dialectical contradiction of the conclusions in the trial, once evidence has already been examined, would hardly enrich the debates. Once allegations have been raised and the evidence presented, the machine would decide.

The machine would enforce the civil judgement. Enforcement, an activity that is already essentially administrative and at times almost bureaucratic<sup>40</sup>, would become automatic. AI would look for the goods of the parties and would liquidate them to satisfy the debtor. It is possible that given the ease of the tools, most judgments condemning the debtor to give, to do, or to forbid doing something would be replaced by financial compensation, leaving only a few judgments for essential *in natura* enforcement that would require complementary activities.

In the criminal process, all activity would consist of locating the offender to proceed with enforcement of the sentence. In the case of prison admission, AI would be particularly essential. Risk prediction programs<sup>41</sup> already play an essential role in this regard and will continue to do so in the future.

## b. Motivation and appeals

The motivation of the judicial decisions would be conceived so that the citizen has an answer to what they raise, but it would be based on the application of the legal system in the same way seen when dealing with independence. Therefore, it is quite probable that it becomes synthetic and contains references that are difficult to refute before the implacable application of the decisions conditioned by the algorithms.

39 See Grace, J., "Machine learning technologies and their inherent human rights issues in criminal justice contexts", 2019, <https://ssrn.com/abstract=3487454>.

40 Carreras Llansana, Jorge, "Jurisdicción exclusiva y excluyente del juez del concurso", in *Estudios sobre la Ley concursal: libro homenaje a Manuel Olivencia*, T. 2 Madrid 2005, p. 1287 and Carreras Llansana, *El embargo de bienes*, Barcelona 1957, p. 95. Nieva Fenoll, Jordi, *La cosa juzgada*, Barcelona 2006, p. 139. Rosenberg, Leo / Gaul, Hans Friedhelm / Schilken, Eberhard, *Zwangsvollstreckungsrecht*, München 1997, p. 11-13.

41 Litinetskaia, Marina, "Dangerosité, délinquance et passage à l'acte: psychopathologie et predictivité", *Annales Médico-Psychologiques*, 2012. Redondo Illescas, Santiago / Andrés Pueyo, Antonio, "La Psicología de la delincuencia, y Predicción de la violencia: entre la peligrosidad y la valoración del riesgo de violencia, ambos en: *Papeles del psicólogo: revista del Colegio Oficial de Psicólogos*, vol. 28, n. 3, 2007 (number "Predicción de la violencia"), p. 147 and p. 157 respectively. Andrés Pueyo, Antonio / López, s. / Álvarez, E., "Valoración del riesgo de violencia contra la pareja por medio de la SARA", *Papeles del Psicólogo*, 2008. Vol. 29(1), p. 107. Pérez Ramírez, Meritxell / Redondo Illescas, Santiago / Martínez García, Marian / García Forero, Carlos / Andrés Pueyo, Antonio, "Predicción de riesgo de reincidencia en agresores sexuales", *Psicothema* 2008, Vol. 20, nº 2, p. 205.

In fact, a motivation of the style that we are used to today it is not even expected, but it is possible that a very plain and simple explanation of the resolution is developed for the citizen to understand. What is relevant in questioning a resolution will not be, as is now, the “reasons of the judge”, but the internal functioning of the algorithm.

The algorithm must be disclosed, in any case, or justice will be even more inextricably arcane than it already is today. The only method of questioning the resolution would be to discuss the operation of the algorithm and explain why a specific case has not been correctly decided. There will be no other possible option if there is total dominance of AI over judicial decisions. Appeals could continue to occur, but their configuration would be different<sup>42</sup>.

In the argumentation of the appeal, it would be necessary to analyse the statistics of states of opinion to which I referred, as well as the case law or statute law followed by the algorithm, thus determining their correctness. In terms of the facts that had been declared proven, the operation of the machine could be discussed in terms of its predictions and evaluation of the antecedents in its databases, the only means through which it can decide, arguing that the situation evaluated in the specific case is different from what had happened in the past. But it would not be easy to contest the decision of a machine.

AI would lead to the disappearance of the supreme courts. With the law precisely laid out with all its legislative history, intentions, and objectives of the legislator well defined, a supreme court has absolutely nothing to add, and would return to its origins in the English process: the House of Lords, in which the Court of Cassation, always *auprès du corps législatif*, was nothing more than a mockery<sup>43</sup>. It would certainly be reinstated in that legislative power.

### **c. An AI defense before an AI judge**

One of the most surprising consequences of AI entering the courts would take place in the criminal process. With no issue of independence in the machine, the application will both investigate and judge without the need of a prosecutor’s office since neither an accusation is necessary to guarantee the impartiality of the judge, nor a guarantor of legality since the AI tool is its own guarantor of itself. In fact, its creators are the guarantors of the entire process. Consequently, today’s process scheme would no longer make sense.

Aside from this, the defense concern will probably focus more on the extra-procedural sociological and economic realities of the parties when it comes to hiring a good algorithm reviewer with the deep legal knowledge to be able to properly

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42 The subject is indirectly raised in a very interesting way by MORSE, S.C., “When Robots Make Legal Mistakes,” *Oklahoma Law Review* 72, n. 1, autumn 2019, p. 213.

43 Nieva-Fenoll, “El origen inglés de la casación francesa”, *Revista Ítalo-Española de Derecho Procesal*, Vol. I, 2020.

present allegations and evidence so that the machine favours its client. Legal assistance could work this way in the future. Formally, as already occurs in our laws at present, the equality of arms will be total. This will likely avoid many lawsuits in the face of relentlessness in the application's decisions, although it is foreseeable that others would emerge in evaluating the options presented by the algorithms. It would be very interesting to prepare the defense under such conditions in this futuristic scenario.

However, much of the defense would also use AI at a much more advanced level than at present<sup>44</sup>, in which we focus only on compiling case law orientations and success rates in cases<sup>45</sup>. In some cases, it would be so obvious that the judicial application itself may dispense with the defense as it is so systematically predictable that it would be given by default to the litigant, at least in the most frequent cases. With this measure, lowering the costs of justice would be a reality.

In other more complex cases, however, it is possible that a new, surprising situation might occur: a machine judge would face machine lawyers. The judicial and legal aid applications, both AI tools, would interact with each other. A jurisdictional application would carry out the work of analysis of the law and evaluation of the evidence, while another tool carries out exactly the same work but with a partial bias that the machine must discover. Hence, if currently it is useful for the litigants' writings to be as objective as possible, in the future that requirement would be truly imperative. The machine would not be impressed by elegant pleas but would need the colder and more verifiable data. Not even Plato when writing the *Gorgias* could have imagined that one day the dangers of rhetoric could thus be eliminated.

## 5. THE RIGHT TO RES JUDICATA

Res judicata is nothing more than a prohibition of the repetition of judgments<sup>46</sup>, which has served us for millennia to prevent the legal uncertainty derived from the possibility of a processes that totally or partially dealt with the same object being repeated. Usually, these cases are difficult to identify, despite frequent attempts by the doctrine to simplify the analysis of the issue, something that infrequently made it even more complicated.

With a process completely governed by AI, however, this problem disappears. Using large databases that are crosschecked with each other, the machine may detect

44 On the current situation, with particular attention to predictive justice, Goodman, C.C., "AI/Esq.: Impacts of Artificial Intelligence in Lawyer-Client Relationships," *Oklahoma Law Review* 72, n. 1 (Autumn 2019), p. 149. See also Taylor Poppe, E.S., "The Future Is Bright Complicated: AI, Apps & Access to Justice," *Oklahoma Law Review* 72, n. 1, autumn 2019, p. 185.

45 See Barona Vilar, S., "Inteligencia artificial o la algoritmización de la vida y de la justicia: ¿solución o problema?", *Rev. Boliv. de Derecho* Nº 28, July 2019, p. 41, commenting on the use of Jurimetry.

46 Nieva-Fenoll, *La cosa juzgada*, Barcelona 2006.



definitive judgments that are incompatible with the current claims of the parties. In other words, duplications will be much easier to spot.

The difficulty that will persist, however, is the determination of cases in which the algorithm must detect this duplication. We are currently solving in a somewhat drastic way the dilemma that arises, for example, in the face of a property claimant by usucaption who previously tried unsuccessfully to bring a claim on the same item. We sanctioned the claimant with estoppel and prevented him from starting that new process.

But with AI, this impossibility must be foreseen in the algorithm so that it will be necessary to determine once and for all what we consider resolved and what opportunities to revisit the case can be given to the litigants. It is possible that the legislator's configuration would be drastic, but it is advisable not to use absolutely inflexible criteria that could cause injustices. In any case, the opportunity to return to matters already decided will probably be increasingly marginal in this possible future.

## 6. CONCLUSIONS

Although it is quite difficult to speculate about future events, it is quite certain that our protection of procedural rights will have to be modified with the introduction of AI in the processes in a much more decisive way than at present. The guarantees that we have are designed to remedy the weaknesses of human beings, mainly judges, once again showing that these rights, like others, are a protective shield for citizens against the enormous power of the State<sup>47</sup>.

If in the future the litigant deals primarily with an AI application, and not with a human, the protection of such rights must be reoriented. We should no longer be so concerned with the independence – and impartiality – of the judges, but rather with that of black box programmers. Likewise, the defense will have knowledge of the algorithms of the tool which is being used; without it, it would be very difficult to question the decisions of the machine. It also runs the risk of being guided by the simple statistical variables of big data. No one should be condemned for having a certain profile; their participation in facts must be ascertained by applying the law in accordance with regulations that will probably be elaborated in a more democratic way, taking much more into account the feelings of the citizen.

Finally, *res judicata* will not cause the problems that it does today. With all court decisions stored in a database, repeated judgments will fortunately be kept to a minimum.

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47 Locke, J., *Two Treatises of Government*, II, Cambridge 1963, p. 377 (137). BLACKSTONE, *Commentaries on the Laws of England*, I, London 1791, p. 126.