

REGULATING THE USE OF AI IN CIVIL PROCEEDINGS*

Fernando GASCÓN INCHAUSTI**

professor (Complutense University of Madrid)

Abstract

The paper addresses several current issues regarding the use of AI in civil justice. It starts from theoretical foundations and addresses the question of how we can define AI, what is the role of AI in today's civil justice system, and what challenges must be overcome when creating legal regulations. The starting point is the need for a clear regulatory framework for the use of Artificial Intelligence systems in civil justice. It presents several legislative techniques (rules granting and/or governing rights; rules establishing prohibitions; rules setting out conditions, requirements and/or obligations.) and the types of legal sources or forms of regulation that can be used in the process of legislation (self-regulation and codes of conduct; soft law; hard law). It also includes a comparative legal perspective (with Spanish and English examples).

Keywords: AI, Artificial Intelligence, civil justice, civil litigation, civil proceedings, regulation of AI

1. The starting point: the need for a clear regulatory framework for the use of artificial intelligence systems in civil justice

It has become a cliché to point out how developments in Artificial Intelligence (AI) in the legal sphere are already having an impact in the field of litigation and, more specifically, in the field of civil litigation. It is equally common to predict that many of the activities inherent to a judicial process or related to it may be entrusted to AI

* This paper is one of the results of the Innovation and Research Project 'Eficiencia y acceso a la justicia civil en tiempos de austeridad – Efficiency and Access to Civil Justice in Times of Austerity' (PID2021-122647NB-I00), funded by the Spanish Ministry of Science.

** ORCID: <https://orcid.org/0000-0003-1620-1627>

systems in the future.¹ These predictions are underpinned by a high confidence in the ability of technologists to develop tools that perfectly fulfil what non-technologists like to imagine.² The proposal to introduce them into civil justice is basically based on postulates of efficiency, which are also usually associated with improving access to justice. Indeed, it is common to read that, as soon as certain AI-operated tools become available, the processing of legal proceedings will be faster, their cost will be much lower, there will be more tools to avoid them or to end them in advance by agreement between the parties, among many other beneficial effects. This will ultimately translate into better access to justice for all those involved in a legal dispute.³

Of course, there is also a strong warning of the dangers that AI brings with it and that efficiency cannot be promoted at any price.⁴ On the one hand, emphasis is placed on the fundamental rights that may be undermined, both from a purely material perspective – such as the right to data protection or non-discrimination – and in the procedural field – the right to an impartial tribunal or to reasoned decisions, among others. On the other hand, and in relation to the latter, one cannot overlook the challenges that the implementation of certain AI systems in relation to certain procedural activities –singularly those that are decisive or those that significantly condition the judicial decision- pose from the perspective of traditional notions of justice and of the safeguards of a fair trial, also in a more abstract or general way.

¹ On this, among many others, see Jordi NIEVA FENOLL: *Inteligencia artificial y proceso judicial*. Madrid-Barcelona, Marcial Pons, 2018. <https://doi.org/10.2307/jj.26844203>; Giovanni SARTOR – Karl BRANTING (ed.): *Judicial Applications of Artificial Intelligence*. Dordrecht, Springer, 1998. <https://doi.org/10.1007/978-94-015-9010-5>; Richard SUSSKIND: *Online courts and the future of Justice*. Oxford, OUP, 2019. <https://doi.org/10.1093/oso/9780198838364.001.0001>; Benedict HEIL: *IT-Anwendung im Zivilprozess Untersuchung zur Anwendung künstlicher Intelligenz im Recht und zum strukturierten elektronischen Verfahren*. Tübingen, Mohr Siebeck, 2020.; Jan DE BRUYNE – Cedric VANLEENHOVE (ed.): *Artificial Intelligence and the Law*. Cambridge, Intersentia, 2021. <https://doi.org/10.1017/9781839701047>; Horst EIDENMÜLLER – Gerhard WAGNER: *Law by Algorithm*. Tübingen, Mohr Siebeck, 2021. <https://doi.org/10.1628/978-3-16-157509-9>; Silvia BARONA VILAR: *Algoritmicación del Derecho y de la Justicia. De la Inteligencia Artificial a la Smart Justice*. Valencia, Tirant lo Blanch, 2021.

² For an accurate and realistic explanation of the legal capability of algorithmic tools – aimed at preventing over-reaction –, see Carla L. REYES – Jeff WARD: Digging into Algorithms: Legal Ethics and Legal Access. *Nevada Law Journal* 21, 1. (2020), 325–378.; Jordi NIEVA FENOLL: Inteligencia Artificial y proceso judicial: perspectivas tras un alto tecnológico en el camino. *Revista General de Derecho Procesal*, 57. (2022).

³ See, among many others, Darin THOMPSON: Creating new pathways to justice using simple artificial intelligence and online dispute resolution. *International Journal of Online Dispute Resolution* 2, 1. (2015), 4–53. <https://doi.org/10.5553/IJODR/2352-50022015002001002>; John ZELEZNIKOW: Can artificial intelligence and online dispute resolution enhance efficiency and effectiveness in courts. *International Journal for Court Administration* 8, 2. (2017), 30–45. <https://doi.org/10.18352/ijca.223>; Ray W. CAMPBELL: Artificial intelligence in the courtroom: The delivery of justice in the age of machine learning. *Colorado Technology Law Journal* 18, 2. (2020), 323–350.; Lisa TOOHEY – Monique MOORE – Katelane DARD – Dan TOOHEY: Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centred Design. *Macquarie Law Journal*, 19. (2019), 133–156. <https://doi.org/10.2139/ssrn.3438538>

⁴ An excellent synthesis can be found in the report of the French *Commission Nationale Consultative des Droits de l'Homme*, given on 7 April 2022 (JORF n° 91, 17 April).

1.1. The relevance of a legal definition of Artificial Intelligence

The discussion is also surrounded by some confusion as to its purpose, as it is also apparent that the advantages and disadvantages of the digitisation of justice, in a broad sense, are often not properly distinguished from those associated with the use of AI in this field. It is clear that the use of AI tools is a manifestation of the digitisation of justice; but it is only one part of this phenomenon, which has very unique nuances and edges, associated with what should be understood as the core or essential content of the notion of AI. The use of AI in the judicial proceedings cannot be identified with the mere ‘technologisation’ of the conduct of the proceedings, but is characterised by the unique way, based on advanced mathematics, through which content or results are reached – in the present case, intended to deploy effects within the framework of a process. It has been stressed, therefore, that the very term ‘artificial intelligence’ may be inappropriate, as it contains an excessive anthropomorphisation of the phenomenon, the psychological impact of which would also serve to promote an exaggerated and therefore unjustified trust and acceptance.⁵ For this reason, proposals have been made to use a more neutral terminology, such as the one made by the French *Commission Nationale Consultative des Droits de l’Homme*, which suggests speaking of «algorithmic decision support systems» (*systèmes algorithmiques d’aide à la décision*, SAAD).⁶

It is not the purpose of these pages to try to offer an innovative definition of what is to be understood by artificial intelligence.⁷ Rather, I intend, in a different way, to stress the need to provide its use in the procedural sphere with its own specific regulatory framework. And precisely because it is a question of influencing the regulatory sphere, the most appropriate thing to do is to operate with a legal definition of artificial intelligence, that is to say, to start from the way in which the legislator itself has defined it or will define it in the future. This is basically a task for the legislator, who must, on the basis of a review of the state of the art at a technical and academic level, establish what should be understood as artificial intelligence in order to regulate it.

In the case of EU Member States, national legislators are spared the trouble of providing a legal definition of AI, as this has been assumed by the European legislator

⁵ Again the report of the French *Commission Nationale Consultative des Droits de l’Homme* sums it up very clearly (§2): « *A titre liminaire, la Commission nationale consultative des droits de l’homme (CNCDH) tient à exprimer ses réserves à l’égard de la terminologie usitée en la matière. Elle observe en effet un excès d’anthropomorphisation dans les termes employés, à commencer par celui de l’» intelligence artificielle «*, mais également lorsqu’il est question de « *réseaux de neurones* », d’*apprentissage profond* », etc. Cela engendre des confusions sur les possibilités réelles offertes par des systèmes de traitement de données, qui reposent sur des procédures codées dans des systèmes informatiques : il s’agit avant tout de mathématiques. L’ensemble des acteurs, tant du secteur public que du secteur privé, devrait donc s’affranchir de cette expression en raison de son impact psychologique, source de réticences ou au contraire de confiance et d’acceptation exagérées.»

⁶ Again, the report of the *Commission Nationale Consultative des Droits de l’Homme* (at §2).

⁷ See, with much more detail, NIEVA FENOLL (2018) op. cit. 20. ff.

in the so-called Artificial Intelligence Act⁸ (AI-Act, hereinafter). According to Article 3(1), the definition is simple and descriptive:

«For the purposes of this Regulation, the following definitions apply:

(1)‘AI system’ means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments».

This definition is clearly aligned with the one offered by the Council of Europe, which on 17 May 2024 approved the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.⁹ Article 2 of the Convention reads as follows:

«For the purposes of this Convention, “artificial intelligence system” means a machine-based system that for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment».

What is important about both ‘European’ definitions, at least when it comes to addressing the consequences of the use of AI in the field of justice, is that they both focus on the results it is capable of producing. By working with data and algorithms, and applying to them the techniques and strategies deemed acceptable at any given time, it is possible to arrive at ‘predictions, content, recommendations or decisions’ that are called upon to produce some kind of effect in the framework of a specific judicial proceeding – this, in my opinion, is where the influence on the environment with which the AI system interacts must be reflected.

These definitions, in any case, open up enormous possibilities for the use of AI in the field of justice, as the notions of content, recommendation, prediction and decision fit within what is usually done, generated or used in the framework of a judicial proceeding.

The category of *content* includes heterogeneous elements, such as written pleadings, documents of all kinds, minutes reflecting the proceedings of an oral hearing or, to

⁸ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). OJ L 12.7.2024.

⁹ CM(2024)52-final.

close the list of examples, reports which, if they had been drawn up by individuals, would have deserved to be classified as expert reports.

When referring to *decisions*, it is inevitable to think of the possibility of an AI system passing judgement at the end of a procedure. But, without going that far, it cannot be forgotten that the development of any judicial proceeding involves a number of decisions, which condition its progress and, therefore, its outcome: the clearest example is the decision on the admission of evidence proposed by the parties

Finally, there are predictions and recommendations.

Predictions can be imagined first and foremost from the side of the legal – and paralegal – professions: AI systems make predictions about the most likely outcome of a case based on the results of previous cases. It is common, at this point, to refer to the AI system that is said to have predicted with an allegedly high accuracy rate (79%) the outcome of claims brought before the European Court of Human Rights, implemented by researchers at University College London and the Universities of Sheffield and Pennsylvania.¹⁰ These predictions are often accompanied by *recommendations*, usually about whether to go to court, to be open to negotiation or even to acquiesce in a lawsuit already filed.

But predictions directly associated with judicial activities and functions in the strict sense are also conceivable. The most famous ones (COMPAS, Hart, VioGén)¹¹ have been developed in the criminal field in relation to the risk of recidivism, and can be used to make decisions on the granting of prison benefits, but also on the adoption of pre-trial detention or other measures with an impact on the liberty of the person undergoing criminal proceedings.

In short, a legal and functional definition of AI, such as the one used by the European legislator and the Council of Europe, is useful for a realistic and critical approach to its use in the field of justice. Within this notion of artificial intelligence systems, we can include a set of tools that have in common the fact that, working with data, they are capable of algorithmically generating content that can influence a judicial proceeding. And everything that influences the proceedings can influence their outcome, i.e. the material rights of the litigants.

¹⁰ The judicial decisions of the European Court of Human Rights (ECtHR) have been predicted to 79% accuracy using an artificial intelligence (AI) method developed by researchers in UCL, the University of Sheffield and the University of Pennsylvania” (<https://www.ucl.ac.uk/news/2016/oct/ai-predicts-outcomes-human-rights-trials>). See Nikolaos ALETRAS – Dimitrios TSARAPATSANIS – Daniel PREOȚIUC-PIETRO – Vasileios LAMPOS: Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. *PeerJ Computer Science*, 2:e93. (2016), available at: <https://doi.org/10.7717/peerj-cs.93>

¹¹ COMPAS (*Correctional Offender Management Profiling for Alternative Sanctions*), used in the USA; HART (*Harm Assessment Risk Tool*), in the UK; VioGén, in Spain, is focused in gender violence cases.

1.2. The relevance of regulatory challenges

This being said, the purpose of these pages is to draw attention to the regulatory challenges involved in the incorporation of AI systems into judicial proceedings – particularly civil proceedings. Procedural Law is essentially ‘artificial’, that is, a creation of the legislator; therefore, it cannot live on the fringes of a legal regulation that defines the way in which each society wants judicial processes to be articulated and developed in all their facets. Introducing AI tools or systems in civil justice involves influencing the rules of the game and, therefore, its legal regulation.

This aim of addressing the regulatory challenges, moreover, is based on an implicit postulate: there is a need for special regulation of the use of AI systems in judicial proceedings – in what matters now, in civil proceedings.¹² In other words, the challenges posed by the use of AI in the procedural sphere cannot be solved by simply applying the existing regulation or the general theory of process and justice. It is true that national Constitutions and supranational texts for the protection of human rights contain rules that may place brakes or limits on certain uses of AI in the process. But these brakes or limits are not clearly defined and, in any case, they are not sufficient to provide legal operators with a playing field endowed with sufficient legal certainty.

Before moving on, it is important to point out that there are two possible regulatory areas to focus on, as the relationship between AI and the judicial function can be seen from two different angles, posing different challenges.

1.2.1. Artificial Intelligence on the periphery of the judicial process: the challenge of rebalancing and limits to privatisation

There are AI systems located – to put it graphically – on the periphery of the judicial process: they are not called upon to produce direct effects in judicial proceedings – they do not interact with them, if we follow the terminology of the AI-Act –, but they do affect the notions of jurisdiction and jurisdictional function, at least in their dimension as a tool for dispute resolution. At least three main types of IA systems fit here:¹³

- I) Firstly, it is worth considering the AI systems that support so-called smart contracts or self-executing contracts, some of which are supported by the Internet of Things. These systems allow certain consequences to be automatically associated with the debtor’s non-performance and thus serve to satisfy the creditor without the need to seek any form of judicial relief. A simple example is provided by contracts that provide for the automatic transfer

¹² See also Giampiero LUPO: 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), 75–96.; Thomas WISCHMEYER – Timo RADEMACHER (ed.): *Regulating Artificial Intelligence*. Dordrecht, Springer, 2020. <https://doi.org/10.1007/978-3-030-32361-5>; Woodrow BARFIELD: *The Cambridge Handbook of the Law of Algorithms*. Cambridge, Cambridge University Press, 2020. <https://doi.org/10.1017/9781108680844>

¹³ See, on this, Horst EIDENMÜLLER – Gerhard WAGNER: Digital Dispute Resolution. In: EIDENMÜLLER – WAGNER (2021) op. cit. 223–260.

of an amount from the debtor's account – or the account of a trustee – to the creditor's account in case the system has not registered the payment when it is due, without any human order or command. A second, somewhat more sophisticated example is the one that provides that, in case the system does not register the payment of the rent due, access to the rented property or vehicle is blocked, again automatically, which is possible because both objects are connected to the network from which the order is processed and commanded to be executed. These appear to be manifestations of self-protection, but the truth is that they are based on the contractual autonomy of the parties, who can consent a priori to the triggering of these effects if the situations of non-compliance described when the legal transaction in question was concluded occur, providing, where appropriate, the relevant codes and/or authorisations so that the contractual execution is possible¹⁴. The incorporation of these systems into contracts is designed to avoid the usual scheme of dispute resolution, by generating a reversal of the burden of initiative: it is not the unsatisfied creditor who has to activate any mechanisms of judicial relief to achieve the performance due, but the debtor who, if necessary, will have to react to an automatism that in the specific case was not justified.¹⁵

- II) Secondly, there are the IA systems underpinning the automated complaint resolution mechanisms used by big companies. Good management of consumer complaints and claims undoubtedly prevents the 'crystallisation' of many disputes, to the benefit of the parties and of the judicial system itself. It should be noted, however, that the algorithms used for this purpose are not designed to take into account the variables and parameters of consumer law, but rather commercial criteria, which, for example, favour the regular customer, who buys frequently and does not usually complain, over the occasional buyer or the one who recurrently requests the return of the purchased goods.¹⁶
- III) Finally, alternative and online dispute resolution (ODR) mechanisms are also supported by AI systems. Examples of online dispute resolution systems are becoming increasingly numerous and, similar to what happens with the management of complaints and claims, they make use of algorithms that do not necessarily take into account the parameters of consumer law – the simplest ones, e.g., offer an amount of money that is determined on the basis of what

¹⁴ Guillermo SCHUMANN BARRAGÁN: *Derecho a la tutela judicial efectiva y autonomía de la voluntad: Los contratos procesales*. Madrid-Barcelona, Marcial Pons, 2022. 397. ff.; Guillermo SCHUMANN BARRAGÁN: *Smart contracts y tutela judicial*. La incidencia de los contratos autoejecutables en la tutela judicial de los derechos y los intereses materiales de los justiciables. *Justicia: Revista de Derecho Procesal*, 2. (2021), 309–338.

¹⁵ See EIDENMÜLLER – WAGNER: (2021) op. cit. 228–235.: as for the advantages, “[i]magine how much simpler and more efficient the repayment of flight costs for flights cancelled during the COVID-19 could have been had such a scheme been in place” (at note 35); see also SCHUMANN BARRAGÁN (2022) op. cit. 397. ff.

¹⁶ See also EIDENMÜLLER – WAGNER: (2021) op. cit. 235–243. (using the example of Amazon's complaints-handling mechanism).

the party making the complaint asks for and what the party against whom the complaint is made is willing to offer. As can happen with the former, ODR mechanisms, which present themselves to their users as sophisticated tools supported by AI, can create a feeling among consumers who complain that they are not entitled to more than what they are offered – or, indeed, that they are not entitled to complain at all, if that is the outcome of the system. And this, in turn, generates a clear deterrent effect, which serves to consolidate unfair situations of infringement of subjective rights.¹⁷

All these AI systems that are on the periphery of the judicial process influence it to the extent that they make it unnecessary, replace it or, more simply, discourage many citizens – often consumers – from resorting to it. What underlies them, in short, is a use of AI that generates – voluntarily or not – a strong privatisation in the management of disputes, which marginalises the role of jurisdiction and the value of the law as the parameter on which its resolution must be based. Therefore, in relation to these AI systems, the regulatory challenge consists of ensuring the existence of a real will on the part of those involved in their use, in order to avoid situations of abuse and imposition.¹⁸ Thus, for example, it is worth considering to what extent it may be legitimate to impose on a consumer the acceptance of contractual clauses that give rise to the automation of payments or the automated blocking of the use of a financed or leased good. And it is equally necessary to ensure adequate levels of information for those who use complaint management systems or AI-assisted ODR mechanisms, so that they are aware that their proposals have no predictive value with respect to the possible outcome of a court proceeding.

The regulatory challenge, in short, must be taken up by the legislator from the perspective and within the parameters of private law, since its objective is to ensure contractual balance and information for the weaker party, so that its legal position is not unduly prejudiced. These regulatory actions should also form part of a more general strategy to overcome the digital gap, avoiding the exclusion of those citizens who do not have access to technological tools or who lack the skills to operate safely in digital environments.¹⁹

¹⁷ On this, see also EIDENMÜLLER – WAGNER: (2021) op. cit. 243–248.

¹⁸ In a similar vein, EIDENMÜLLER – WAGNER: (2021) op. cit. passim.

¹⁹ In this vein, it is worth recalling the ECtHR judgment in *Xavier Lucas v. France* (Application 15567/20, 9 June 2022). The Court considered that the applicant's right of access to justice had been infringed as a court of appeal failed to admit an appeal that had not been lodged using the mandatory platform, disregarding the practical and technical problems encountered by the applicant as he tried to do it. Such an excessive and disproportionate formalism was not, in the case at hand, compatible with the Convention.

1.2.2. Artificial Intelligence in the core of the judicial process: the challenge of legal certainty

In addition to the above, there are – and can be imagined – AI systems designed to be applied directly in the core of judicial activity, either to help or assist decision-makers or to replace them. A complete replacement of judicial decision-making by AI systems is at present technically impossible and legally unacceptable: this can be deduced from Article 22(1) of the European General Data Protection Regulation and is also advocated in the EU Proposal for a Regulation, as will be seen below.

Help and assistance tasks, on the other hand, can be developed in different ways and in many areas, as mentioned above. One can think of systems that generate content to be made available to courts, such as the *DataJust* project launched by the French Ministry of Justice, which aimed to create an algorithm capable of extracting and exploiting in an automated way the data contained in court decisions on personal injury compensation, including the amounts requested and finally obtained and the valuations made in the framework of consensual dispute resolution procedures.²⁰ AI systems that automate binary type decisions can also be envisaged, as may be the case where the order for payment procedure does not require documentary support; or decisions in relation to procedural issues that depend on simple and/or uncontroversial factual points.²¹ And, of course, the use of predictive systems, such as those mentioned above to help gauge the risk of recidivism – or others that could be developed for other purposes, such as the danger that the abducted child, if returned, would suffer serious harm – is increasingly being considered.

These uses of AI at the core of judicial activity are those referred to in the praises as well as in the calls for attention and warnings referred to at the beginning of this paper. And, as has already been said several times, their impact on the proceedings may affect the fundamental rights of the litigants and end up having consequences for their outcome, while at the same time implying a paradigm shift in basic notions of the rule of law, such as those of jurisdictional, judicial power and fair trial. In relation to these uses of AI, the regulatory challenge is also clear: it is a matter of drawing clear and precise lines, in order to ensure legal certainty, which grant a defined status to the litigants, so that their rights are defined, but also what can be validly imposed on them in the interests of the efficiency of the system.

The inadequacy of the current regulatory framework to meet these challenges makes the need for rules imperative. Some of them must be purely procedural rules, others certainly not. What kind of rules and with what content? That is, of course, the difficult

²⁰ The project was approved by decree n°2020-356 of 27 March 2020 (Journal Officiel n°77 of 29 March 2020). In January 2022, however, it was abandoned due to the difficulty and complexity of the work to be carried out.

²¹ See In this regard, the interesting proposal to automate the decision on the existence of jurisdiction, defences, and applicability of the US Alien Tort Claims Act and Torture Victims Protection Act, In: Eric A. ENGLE: An Introduction to Artificial Intelligence and Legal Reasoning: Using xTalk to Model the Alien Tort Claims Act and Torture Victims Protection Act. *Richmond Journal of Law & Technology* 11, 1. (2004). <https://jolt.richmond.edu/vol-xi-issue-1/>.

part. Apart from the fact that it is always costly to legislate properly, there are two additional complicating factors in this area.

The first challenge is the multidisciplinary approach that any regulation in this field must have. Even if the rules primarily concerned with defining everything that concerns the (proper) functioning of judicial processes have to be procedural rules, it is clear that the rules on the use of AI in the field of civil justice have to be consistent with the set of rules on the use and development of AI in general.

The second challenge has to do with the timeliness of regulation, insofar as we are largely considering the need to regulate the impact on the civil process of AI systems that do not yet exist, but which we think may end up existing if we take into account the development capacity of technology in this field, but which in any case are not yet operational and whose uses, capacities and shortcomings have not yet been tested. Can we regulate non-existent realities? It is a classic problem, the legislator always lags behind reality. Now, on the contrary, there seems to be an aspiration for the legislator to be ahead of reality. But here with a speciality: the reality on which lawmakers are called to operate is a reality that is being built by AI developers, who are aware that they will be the addressees of many of the rules that have to regulate it.

In order to address these issues, it is important to draw attention to two distinct questions: firstly, the angles or perspectives from which to approach the regulation of the use of AI systems in civil proceedings; secondly, and related to this, the best way – or legislative formula – to do so.

2. Angles or perspectives of regulation

When we talk about AI and civil proceedings, we may be talking about very different issues, depending on the subject we are looking at and what that subject expects from the legislator. The rules that are to regulate the use of AI systems in civil proceedings, in other words, have to cover a series of regulatory needs, which are a reflection of the expectations of those to whom they are addressed. We should aim for a use of AI systems in civil proceedings that meets the expectations of their supporters and, at the same time, does not cross certain ‘red lines’ associated with the requirements of the rule of law and essential procedural safeguards. To this end, up to three angles or perspectives need to converge in the regulation:

- The legislator can be expected to establish and regulate rights, especially in favour of litigants.
- It is also to be expected to impose certain prohibitions, either in relation to the development of certain AI utilities in general, or in relation to their use in a certain way or for a certain purpose.
- Finally, and above all, a number of duties and obligations have to be established, affecting not only litigants or courts, but also the designers and developers of AI systems focused on the civil process.

2.1. Rules granting and/or governing rights

A proper balance between efficiency and respect for essential procedural values requires, first and foremost, that a number of rights vis-à-vis the State (i.e., the court system) be recognised for the litigants, when the State intends to use AI systems in civil proceedings, in whatever dimension this is possible.

What those rights should be is, of course, up for debate. This is an apparently peaceful debate if the discussion is kept at a very superficial level, but it undoubtedly becomes polemic when it gets down to detail, as the recognition of certain rights may undermine in practice certain AI functionalities that, without those limitations, would result in greater efficiency.²²

Without wishing to be exhaustive, we can think of some examples of possible rights of claimants and defendants that are often referred to and of the consequences of their recognition (or not) and of the concrete terms in which this is performed:

- I) There is talk of the right of citizens to have AI mechanisms that ensure the rapid and ‘blind’ processing of simple and repetitive disputes, as a way of reducing costs, speeding up time and ensuring access to justice.²³ It is obvious that such formulations do not entail the recognition of genuine rights, but only a hypothetical duty of the State to design judicial processes assisted by AI systems, within which it would be necessary to determine precisely what rights the parties have.
- II) It is also common to refer to a right of the litigant to know that an AI system is being used in a certain aspect of the proceedings.²⁴ While regulating such a right should not be problematic, the need to do so is the best evidence of the need for special rules and the inadequacy of general procedural rules. Article 15(2) of the Council of Europe Convention expressly gives the States the duty to ensure that, ‘as appropriate for the context, persons interacting with artificial intelligence systems are notified that they are interacting with such systems rather than with a human’.
- III) It is also proposed to recognise the ‘right to a human judge’, which can also be seen as a manifestation of the so-called “refusal of care”, i.e. the right of a citizen to refuse to allow an automated decision driven by an AI system to

²² Among many others, André DAO: Human Dignity, the Right to be Heard, and Algorithmic Judges. *The British Yearbook of International Law*, (2020), 1–38. <https://doi.org/10.1093/bybil/braa009>; Tania SOURDIN: Judge v. robot: Artificial intelligence and judicial decision-making. *University of New South Wales Law Journal* 41, 4. (2018), 1114–1133. <https://doi.org/10.1007/978-94-015-9010-5>

²³ Jordi NIEVA FENOLL: Online dispute resolution for small claims: is this the only realistic solution?. *Revista Ítalo-española de Derecho Procesal*, 1. (2022), 25–36.

²⁴ Most soft-law texts on this issue insist on this: see, for instance, the *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, elaborated by the CEPEJ (available at <http://bit.ly/3W4dfSw>); the *CCBE Considerations on the Legal Aspects of Artificial Intelligence*; or the *Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings*, that expressly state at 6: «Parties should be notified when it is intended that their case will be processed with the involvement of an AI mechanism» (available at <https://tinyurl.com/35f6yuyyn>).

affect the process.²⁵ The recognition of such a right may represent a ‘torpedo in the waterline’ for the implementation of AI in civil proceedings. It would possibly also be unjustified, as it does not seem reasonable to recognise the right to reject the use of AI-based tools for any decision making, but only for some – those with the greatest impact on the substantive legal position of the litigants. One modality can be read in Article 22(1) of the European General Data Protection Regulation²⁶ (GDPR) according to which:

«The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.»

Given the general scope of the Data Protection Regulation, it is unclear whether this rule could be directly applicable to the field of civil justice and what its specific scope would be: would it serve, e.g., to oppose the quantification of the personal injury suffered in a traffic accident to be carried out in a fully automated way with the support of an AI system?

In any case, the provision is clearly indicative of a restrictive approach to a nuclear issue. But, on the other hand, the terms in which it is drafted also contain the ‘trick’ to avoid its full application: the use of the adverb ‘solely’. Indeed, in practice it is difficult to imagine a judicial decision being presented as founded or based solely on the application of an AI system, although in many cases the human/judicial intervention will be more formal than real.²⁷

²⁵ As suggested, for instance, by the *European ethical Charter* of the CEPEJ: “The user must be informed in clear and understandable language whether or not the solutions offered by the artificial intelligence tools are binding, of the different options available, and that s/he has the right to legal advice and the right to access a court. S/he must also be clearly informed of any prior processing of a case by artificial intelligence before or during a judicial process *and have the right to object, so that his/her case can be heard directly by a court within the meaning of Article 6 of the ECHR.*” (emphasys added). There is also a reference to it in the *Guiding Principles for Automated Decision-Making in the EU* of the *European Law Institute*, who insist in the need to offer an alternative human-based route to exercise rights (Principle 8) (available at <https://tinyurl.com/4rmkdecx>).

²⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, 1–88).

²⁷ In other legal systems, however, more rigid rules have been adopted, avoiding adverbs such as ‘solely’ or ‘exclusively’ and the escape valve they open. This is the case of France, for instance, where, pursuant to Article 47 of Law n° 78–17 of 6 January 1978 relating to data processing, files and freedoms, as amended in 2018, «aucune décision de justice impliquant une appréciation sur le comportement d’une personne ne peut avoir pour fondement un traitement automatisé de données à caractère personnel destiné à évaluer certains aspects de la personnalité de cette personne» («no court decision involving an assessment of a person’s conduct may be based on automated processing of personal data intended to evaluate certain personal aspects relating to that person»).

There is an additional factor, of a human and psychological nature, associated with the intrinsic difficulty of making decisions in complex scenarios. In general terms, there is an understandable human tendency to try to delegate complex decisions, or at least all or part of the bases for these decisions, to a third party – the increasingly frequent submission to the judgement of experts is a manifestation of this phenomenon. This tendency is accentuated in times like the present, when media pressure and hasty criticism of judicial decisions undermine judicial independence. And if the third party to whom the decision making is delegated, in whole or in part, is not another person – who could perhaps reject the assumption of responsibility – but a ‘machine’ or an ‘AI system’, the consequences may be obvious: predictions made by artificial intelligence systems will eventually be integrated into the decision-making process in complex cases, as those, for example, linked to the risk of criminal recidivism. And they will not necessarily do so in an equanimous or neutral way, but with a certain ‘appearance of a better condition’, precisely because of this claim to objectivise what is intrinsically not objectivisable. It can always be said that there are no automatisms and that, for example, the risk of recidivism offered by the system is just one more factor to be taken into account when a judge makes his or her decision. But the danger that they may end up having a greater weight than is openly acknowledged by the judge in his or her decision cannot be ignored or disregarded.

Imagine, by way of example, a case of gender-based violence in which the AI system would have shown a high – or even medium – probability of repetition: the specific judge who decides to depart from that result and chooses not to adopt severe protective measures exposes himself to a clear risk in case his own assessment turns out to be incorrect and a new criminal act against the victim occurs; from a media – even disciplinary – point of view, his lack of diligence and his lack of ‘sensitivity’ may end up being sustained, given his departure from the result offered by the AI system.... Faced with a generalisation of reasoning of this kind, there is a clear danger for the effectiveness of the right of defence, which will have to adapt to the data and indicators handled by the artificial intelligence systems. Thus, e.g., when facing the hearing for the decision on the personal situation of the person under investigation, it will be necessary to know the parameters on which the artificial intelligence systems handled by the judge are based, in order to be able to formulate allegations and offer evidence to try to refute possible appearances considered as negative by them. It should be noted, however, that this defensive approach ends up being underpinned by a certain reversal of the burden of proof, without overlooking the fact that what cannot easily be questioned in a specific case is the scientific or empirical basis of the artificial intelligence system.

- IV) As an intermediate option, the right to human oversight is mentioned, for instance, by Article 14 of the European AI-Act: AI systems in the field of justice shall be designed and developed in such a way that they can be effectively overseen by natural persons during the period in which they are in use, in order to prevent or minimise the risks to fundamental rights that may emerge.

The natural person in charge of the oversight should be the judge or a qualified court officer.

- V) As a possible evolution of human oversight, some texts allude to the right of a human judge to review a decision taken by an AI system;²⁸ but this is still not a perfect solution –from the point of view of efficiency, of course–, as, at the very least, the speed of automated decision making is lost. It is also worth noting the great paradox involved in transferring the notion of recourse to the field of automated decisions, since it has traditionally been held that the basis of the recourse system is precisely human fallibility. Obviously, there is always room for human error in the judicial decision assisted by an AI system. And, in the case of a hypothetical decision that is completely automated and outside the human will, the human review that is advocated may not obey the traditional logic of appeals, but it is the expression of a basic safeguard: it is the person who controls the machine.

The Council of Europe Convention addresses this problem from the perspective of remedies: pursuant to Article 14(1) accessible and effective remedies should be available for violations of human rights resulting from the activities within the lifecycle of artificial intelligence systems; these ‘remedies’ may not need to be adjusted to the notion of appeal, but in that case national lawmaker should design an equivalent alternative.

The European AI-Act, in a related manner, enshrines in Article 86 the ‘Right to explanation of individual decision-making’: a person adversely affected on their fundamental rights by a decision taken on the basis of the output of an AI system shall have the right to obtain from the deployer [i.e., by the court] clear and meaningful explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken. This right could be, at least in some cases, the ground or the first step on which to sustain an appeal against the decision.

- VI) It is also proposed to recognise the litigant’s right to know how the AI system works and, in particular, its various ‘ingredients’ (algorithm, data), their relative weight and how they have been obtained, as a way of being able to defend oneself and to challenge the results²⁹ (e.g. when the system offers a certain quantum of compensation). The realisation of this right, however, may conflict with the intellectual property rights of the company that has developed the system and may lead to a loss of interest in the private sector in developing

²⁸ See, among others, section 20 of the *Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings*: ‘Where national law allows for purely automated decisions, such decisions should be open to review before a judge’ (available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a2cf96); see also Principle 10 of the *Guiding Principles for Automated Decision-Making in the EU* of the *European Law Institute*, envisages a right to human review of selected significant decisions on the grounds of the relevance of the legal effects, the irreversibility of their consequences, or the seriousness of the impact on rights and legitimate interests.

²⁹ On this, Hannah BLOCH-WEHBA: *Access to Algorithms*. *Fordham Law Review* 88, 4. (2020), 1265–1314.

AI systems in the service of civil justice. On the other hand, this right is not really effective if the litigant is not assisted by a competent expert to evaluate the information obtained in relation to the functioning of the system, the costs of which can be high – and this, in turn, may compromise the principle of equality of arms and the right of defence.³⁰

³⁰ In criminal matters, the European Court of Human Rights seems to have given support to an additional right, linked to the right of defence, consisting of being able to know the criteria used by the criminal prosecution authorities to manage, through AI systems, the information resulting from massive data searches. In this regard, see, for example, the judgment of 4 June 2019 in the case of *Sigurður Einarsson and Others v. Iceland* (Application no. 39757/15):

«90. The Court accepts that by its nature the “full collection of data” inevitably included a mass of data which was not *prima facie* relevant to the case. Moreover, it can accept that when the prosecution is in possession of a vast volume of unprocessed material it may be legitimate for it to sift the information in order to identify what is likely to be relevant and thus reduce the file to manageable proportions. It considers nevertheless that in principle an important safeguard in such a process would be to ensure that the defence is provided with an opportunity to be involved in the definition of the criteria for determining what may be relevant. In the present case, however, the applicants did not point to any specific issue which they suggested could have been clarified by further searches, and in the absence of such specification – which was open to them under section 37 § 5 of the Criminal Procedures Act – the Court has difficulty in accepting that a “fishing expedition” of this kind would have been justified. In that respect, the data in question were more akin to any other evidence which might have existed but had not been collected by the prosecution at all than to evidence of which the prosecution had knowledge but which it refused to disclose to the defence. Thus, while the Court reiterates that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused, and indeed the prosecution in the present case had a duty under domestic law to take into consideration facts both for and against a suspect – in line with the Court’s own case-law –, the prosecution was not in fact aware of what the contents of the mass of data were, and to that extent it did not hold any advantage over the defence. In other words, it was not a situation of withholding evidence or “non-disclosure” in the classic sense.

91. The situation is different with regard to the data “tagged” as a result of the initial Clearwell searches. These data were reviewed by the investigators, both manually and by means of further Clearwell searches, in order to determine which material should be included in the investigation file. While here again the excluded material was *a priori* not relevant to the case, this selection was made by the prosecution alone, without the defence being involved and without any judicial supervision of the process. In that connection, the Court recalls that “a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1” (*Rowe and Davis*, cited above, § 63). Moreover, the defence was denied lists of the documents – and in particular the “tagged” documents – on the ground that they did not exist and that there was no obligation to create such documents, and reference was also made to the technical obstacles to remigrating the data and conducting new searches, given the volume in question. As to the denial of lists, the Court has no reason to question the finding of the Supreme Court that under domestic law there was no obligation on the prosecution to create documents which did not already exist. It notes, however, that it appears that further searches in the data would have been technically rather straightforward and it considers that in principle it would be appropriate for the defence to have been afforded the possibility of conducting – or having conducted – a search for potentially disculpatory evidence. While it is sensitive to the privacy issues raised by the Government, the Court does not consider that there were insurmountable obstacles in that respect. It thus finds that any refusal to allow the defence to have further searches of the “tagged” documents carried out would in principle raise an issue under Article 6 § 3(b) with regard to the provision of adequate facilities for the preparation of the defence.»

- VII) An extension of the use of AI systems in the judicial sphere must go hand in hand with increased competence of the lawyers who have to assist the parties.³¹ Consequently, the duties of lawyers must be strengthened when dealing with this type of environment and, to that extent, we could even talk about the right to a ‘technologically competent lawyer’, which is reflected in the requirements imposed by professional associations for access to the profession, as is happening in the United States, where in more and more states technological competence is being imposed among the obligations of members.³²
- VIII) To close this list of examples, there is also talk of the right to compensation in the event of damage resulting from the malfunctioning of an AI system, which can also occur in the context of a procedure. At this point, there are some proposals for regulation,³³ which take on board the difficulty of establishing the limits between strict liability and fault liability, and the indirect consequences that this can have: if the system developer is held liable, it can discourage innovation or increase the cost of the systems; if the judiciary is liable, then its use can also be discouraged.

In short, it is going to be complicated from the outset to select which rights are finally recognised for litigants and the extent to which this is done. But it cannot be left undone, because the determination of these rights is essential in order to concretely determine how the ‘red lines’ deduced from the Constitutions and supranational texts on the protection of human rights are materialised. Squaring the circle between efficiency and guarantees is not always possible. After all, these are legislative policy decisions that must be taken by the State, otherwise they will operate according to market parameters and technological availability.

2.2. Rules establishing prohibitions

The introduction of AI systems in the area of civil justice in a way that is compatible with due process and the principles of the rule of law also requires the establishment of prohibitions. These prohibitions define the red lines that a given society does not want to cross when assessing the degree in which it considers automation of justice acceptable.

³¹ On this, see Angelo DONDI: *Processo civile, new technologies e implicazioni etico-professionali*. *Rivista trimestrale di diritto e procedura civile*, 3. (2019), 863–881.; see also REYES – WARD (2020) op. cit.

³² This has been the case, for instance, of California. Since March 2021, the comments to California Rule of Professional Conduct 1.1 provide that competent legal services includes “the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.”

³³ See, e.g., the European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). On this, see Horst EIDENMÜLLER – Gerhard WAGNER: *Liability for Artificial Intelligence: A Proposal of the European Parliament*. In: EIDENMÜLLER – WAGNER (2021) op. cit. 127–156.

In many cases these prohibitions can be seen as a reflection of certain fundamental rights, which can be recognised and attributed on an individual basis. A good example is again provided by some of the data protection rules: a prohibition on the use of certain data by an AI system can be seen as the flip side of the right of data subjects not to have some of their data used without their consent –or for certain purposes or in certain fields.

In this vein, Article 9(1) of the European GDPR establishes the following:

«Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited».³⁴

While there are some exceptions, it is clear that this type of data, e.g., could not be used in an AI system designed to determine, under Article 13(b) of the 1980 Hague Convention on Child Abduction, that 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.³⁵ It shall be borne in mind, in addition, that the same Article 13 adds the following provision:

«In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence».

This is something that in abstract could make it amenable to processing by an AI system, analogous in some respects to COMPAS, HART or VioGen –i.e., AI systems whose purpose is to determine the level of risk of recidivism of an offender – systems that also take into consideration the social environment of the person to whom they refer.

³⁴ In a similar vein, see also Article 11(1) of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89–131):

«Member States shall provide for a decision based solely on automated processing, including profiling, which produces an adverse legal effect concerning the data subject or significantly affects him or her, to be prohibited unless authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller.»

³⁵ See Paul BEAUMONT – Peter McELEVAY: *The Hague Convention on International Child Abduction*. Oxford, OUP, 1999. <https://doi.org/10.1093/oso/9780198260646.001.0001>

Prohibitions, however, need not necessarily reflect a subjective right. In many cases, their basis will be broader and associated with the constitutional requirement of respect for fundamental human rights principles and to the rule of law itself. Again, some examples will be of help:

The ability of some AI systems to predict the outcome of a court case based on data extracted from previous court decisions has been talked about for a number of years now. These applications are of particular interest to law firms and their clients, for obvious reasons, as they influence strategic decisions when litigating or negotiating.

This potential of AI also has its drawbacks and, in fact, it is notorious that somewhere there has been a desire to curb this practice. I am referring to France, where as a result of a law of 2019³⁶, both the Code of Administrative Justice (art. L. 10) and the Code of Judicial Organisation (art. L. 111–13) were amended, which now include the following provision:

«The identity data of judges and court officials may not be re-used for the purpose or effect of evaluating, analysing, comparing or predicting their actual or supposed professional practices. Violation of this prohibition is punishable by the penalties provided for in Articles 226–18, 226–24 and 226–31 of the Criminal Code, without prejudice to the measures and penalties provided for by Law No. 78–17 of 6 January 1978 on information technology, files and freedoms.»³⁷

The explanation is offered by the Act itself in a very simple and straight way: ‘Profiling of judges and court officials will also be prohibited so as not to undermine the proper functioning of justice’.³⁸

Another example of a ban is found in the European AI-Act. The AI-Act does not have a sectoral but a horizontal approach: it does not therefore focus specifically on the use of AI in the field of justice, but analyses it as a global phenomenon, with potential impacts on many areas of economic and social life.

Following a risk-based approach, common requirements are laid down for the placing on the market, the putting into service and the use of AI systems in the Union; namely, specific requirements for high-risk AI systems and obligations for operators of such systems, harmonised transparency rules for certain AI systems intended to interact with natural persons, as well as rules on market monitoring and surveillance.

³⁶ *Loi n° 2019–222 du 23 mars 2019 de programmation 2018–2022 et de réforme pour la justice* (see, more specifically, Article 33). Available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000038261631/>.

³⁷ «Les données d'identité des magistrats et des membres du greffe ne peuvent faire l'objet d'une réutilisation ayant pour objet ou pour effet d'évaluer, d'analyser, de comparer ou de prédire leurs pratiques professionnelles réelles ou supposées. La violation de cette interdiction est punie des peines prévues aux articles 226–18, 226–24 et 226–31 du code pénal, sans préjudice des mesures et sanctions prévues par la loi n° 78–17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés»

³⁸ Rapport annexé, at 1.2.7 : «Une justice plus prévisible» : «Le profilage des magistrats et des fonctionnaires du greffe sera également interdit afin de ne pas porter atteinte au bon fonctionnement de la justice.»

Nevertheless, and backing on this risk-based approach, certain AI practices are prohibited: the EU considers as potentially causing an unacceptable risk those AI systems considered a clear threat to the safety, livelihoods and rights of people, which shall be banned. This includes AI systems or applications that purposefully manipulate human behaviour to circumvent users' free will (e.g. toys using voice assistance encouraging dangerous behaviour of minors) and systems that allow 'social scoring' by governments. More specifically, Article 5(1)(c) of AI-Act prohibits, among other unacceptable-risk AI practices:

«(c) the placing on the market, the putting into service or the use of AI systems for the evaluation or classification of natural persons or groups of persons over a certain period of time based on their social behaviour or known, inferred or predicted personal or personality characteristics, with the social score leading to either or both of the following:

- (i) detrimental or unfavourable treatment of certain natural persons or groups of persons in social contexts that are unrelated to the contexts in which the data was originally generated or collected;
- (ii) detrimental or unfavourable treatment of certain natural persons or groups of persons that is unjustified or disproportionate to their social behaviour or its gravity.»

This prohibition, which ties in with Art. 9(1) of the GDPR, would oblige the justice systems of EU Member States to prohibit the use of such systems in matrimonial matters, for example, to decide on the custody of children or, again, in international child abduction cases, when determining whether there are exceptional circumstances justifying the refusal to return the child to the place from which he or she was removed.

Defining the scope of the prohibitions is also an exercise in legislative decision-making and in the drawing of red lines. The French legislator's decision regarding the use and re-use of the identity of judges and court officials has been widely questioned, possibly because it involves an exercise of preference between two options that, in the abstract, would have been constitutionally legitimate.

The exclusion established by the European legislator, on the other hand, is much easier to explain in a socio-political context such as the European one, which places absolute value on human rights. But it will probably have to coexist with the use of systems prohibited in Europe by the judicial or administrative authorities of other countries that have a different vision of the limits to the use of AI. To follow the example, it is possible that the authorities of a third State refuse to return an abducted child to a EU Member State on the grounds that their IA system for predicting the risk of physical or psychological harm to the child gives a high result – although it is a system that takes into account sexual orientation, race or religious beliefs for this purpose. And, in a case like this, the paradox could not be avoided, even if the Regulation applies to «providers and deployers of AI systems that have their place of establishment or are located in a third country, where the output produced by the AI system is used in the Union » [Article 2(1)(c)].

Prohibitions must in any case be accompanied by measures to ensure compliance: and this is again an area where the legislator must be effective. French law punishes re-use of the data with criminal and administrative sanctions, because the potential offenders are companies that are not involved in litigation. In other cases, however, procedural consequences cannot be avoided, and in particular the absolute nullity of decisions taken under the possible influence of a prohibited AI system.

2.3. Rules setting out conditions, requirements and/or obligations

As in many other areas, the balance between the advantages and risks of the use of AI systems in civil proceedings is in most cases a question of limits, which can be set by imposing conditions, requirements and/or obligations on certain subjects. An adequate regulation of AI in civil justice therefore requires the introduction of rules that, through a definition of these conditions, requirements and/or obligations, make it possible to outline the range of action that a society wishes to offer AI and the relative weight it attributes to its advantages and the values it endangers.

It is precisely this approach to the regulation of AI and its impact on the civil process that emerges very clearly from the European AI Act: the aim is to direct regulatory action primarily at the providers and deployers/users of AI systems. The Regulation, along with the prohibition of the most offensive AI practices, identifies a number of AI systems that can be considered high-risk and subjects them to strict obligations before they can be put on the market and used.³⁹

Among the AI systems identified as high-risk, Annex III of the Act includes some of interest, due to their (potential) link to (civil) justice:

In the field of ‘Access to and enjoyment of essential private services and essential public services and benefits’, the Proposal mentions, among others, in paragraph 5:

«(a) AI systems intended to be used by public authorities or on behalf of public authorities to evaluate the eligibility of natural persons for essential public assistance benefits and services, including healthcare services, as well as to grant, reduce, revoke, or reclaim such benefits and services».

This label could include, for instance, potential AI systems that may be used by legal aid public providers when assessing factors such as whether or not the claim for which a person is seeking financial support is sustainable – provided that legal aid could be considered as an ‘essential’ public assistance benefit –; if so, its potential impact on the fundamental right of access to justice would be clear.

³⁹ A similar approach appears to be followed in Canada, where a new law is currently before Parliament that, among other objectives, seeks to regulate the activity of developers and users of AI systems (Bill C-27: An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts: <https://www.parl.ca/legisinfo/en/bill/44-1/c-27>).

In a more obvious manner, the Proposal also envisages in paragraph 8 a block of high-risk AI systems related to ‘Administration of justice and democratic processes’, which includes

«(a) AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution».

This easily includes most of the AI systems already in existence and, above all, those that are currently only projects or mere lucubrations. By including all of them in the notion of high-risk systems, the European legislator underlines their consideration, in any case, as elements of possible distortion of the usual schemes for the functioning of justice and the proceedings. On the other hand, the reference to high-risk systems being those that are intended to ‘assist’ a judicial authority in its task of applying the law to the specific case suggests that those that seek to replace it must be considered prohibited. However, it has already been noted above that the boundaries between replacement and assistance are blurred, something that probably also explains the general classification as high-risk systems of all those that may have an impact on the development of the process and the decision that brings it to an end.

This is not the place to analyse in detail the requirements and obligations for the authorisation to market and use this type of AI systems. In summary, the AI-Act includes the following:

- Adequate risk assessment and mitigation systems.
- High quality of the datasets feeding the system to minimise risks and discriminatory outcomes.
- Logging of activity to ensure traceability of results.
- Detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance.
- Clear and adequate information to the user.
- Appropriate human oversight measures to minimise risk.
- High level of robustness, security and accuracy.

In addition, the AI-Act creates a complex institutional set-up to ensure adequate market monitoring and surveillance, at a European level (with the European AI Office,⁴⁰ a European Artificial Intelligence Board and the reinforcement of the role of the European Data Protection Supervisor), but also at the Members States national level, which shall have ‘IA market surveillance authorities’ which, among other, should investigate compliance with the obligations and requirements for high-risk AI systems

⁴⁰ According to Article 3(47), the AI Office is the Commission’s function of contributing to the implementation, monitoring and supervision of AI systems and general-purpose AI models, and AI governance.

already placed on the market, as well as compliance of operators –including court systems– with their relevant obligations under the regulation.

The focus of these rules is therefore on requirements, certifications, authorisations, supervisions and sanctions. In short, a more administrative than procedural vision prevails. But the regulation is done, in any case, taking into account the rights to be promoted and the prohibitions or limits that cannot be exceeded.

These rules, which establish requirements and obligations for providers and deployers/users of AI systems, are an essential tool for an adequate regulation of AI in proceedings, even if the rules themselves are not procedural in nature. They are, in other words, an effective formula to ensure respect for the procedural rights that may be recognised to litigants and to ensure that prohibitions are also upheld.

But this does not mean that any AI system that respects them should necessarily be capable of being used by the judicial system without further ado. In some cases, a further weighing of the advantages and disadvantages will be necessary, which should be left to the procedural legislator in view of its impact on the rights of the litigants and, more generally, in view of the possible medium to long-term consequences on the system as a whole.

3. Forms of regulation

In this diffuse and malleable field of new technologies and their impact on the legal sphere, it is common to hear reminders of the limitations of ‘traditional’, ‘national’ legislation to achieve certain objectives. It is therefore useful to think about possible ways of recognising rights, setting prohibitions and establishing requirements and/or obligations. Again, there are several options, which need not be (mutually) exclusive: self-regulation, soft-law and hard-law.

3.1. Self-regulation and codes of conduct

Self-regulation by those involved in the development and marketing of AI systems is conceivable and is often articulated through codes of conduct or codes of ethics. Some companies offering – not necessarily legal – services based on AI systems advertise their ethical commitments. The European AI-Act itself aims to promote the creation of codes of conduct, in order to encourage providers of non-high-risk AI systems to raise their standards and apply on a voluntary basis (some of) the mandatory requirements and obligations laid out for high-risk AI systems (Article 95).

Self-regulation must undoubtedly be very important and can serve to strengthen confidence in non-high-risk AI systems that can also be used in the field of civil justice. But it is also clear that:

- a) It needs an external frame of reference: this is clearly visible in the European Regulation, which links the content of codes of conduct to the requirements imposed for the development of high-risk IA systems.
- b) Their lack of external enforceability does not ensure respect for the rights of users or recipients (including litigants), nor does it guarantee that, in the face of

a given conflict of interest, the company does not end up overstepping its own self-imposed limits.

3.2. Soft law

In recent years, there has been a proliferation of studies, recommendations or guidelines from supranational institutions or professional organisations on ‘ethical uses’ and ‘appropriate uses’ of AI, in general terms, although many of them also warn of its repercussions on civil justice and, even more significantly, on criminal justice and law enforcement. Without wishing to be exhaustive, and focusing on those that deal more specifically and directly with the field of Justice, the following can be recalled:

- The *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, adopted in December 2018 by the Council of Europe’s CEPEJ (European Commission for the Efficiency of Justice).⁴¹ The Charter enshrines five principles: respect for fundamental rights; non-discrimination; quality and security; transparency, impartiality and fairness; and ‘under user control’, precluding a prescriptive approach and ensuring that users are informed actors and in control of the choices made. Many of these principles have been developed in the 2024 Council of Europe Framework Convention.
- The *CCBE Considerations on the legal aspects of Artificial Intelligence*, approved in 2020 by the Council of Bars and Law Societies of Europe.⁴² Although it does not take the form of a normative instrument, a number of recommendations and limits that should guide legislative action in this area can be clearly deduced from its reading.
- The *Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings*, adopted in June 2021,⁴³ which are aimed ‘to serve as a practical tool for the member States, to assist them in adapting the operation of their online dispute resolution mechanisms to the provisions of Articles 6 and 13 of the European Convention on Human Rights and the principles developed thereto in the case law of the European Court of Human Rights’. Although they are not exclusively concerned with AI, some of the guidelines refer directly to it.⁴⁴
- The proposal for *Guiding Principles for Automated Decision-Making in the EU* published by the European Law Institute in the form of an ELI Innovation

⁴¹ See n. 24.

⁴² See n. 24.

⁴³ See n. 28.

⁴⁴ For example, the guidelines on fair procedure include three relevant provisions: ‘6. Parties should be notified when it is intended that their case will be processed with the involvement of an AI mechanism’; ‘18. Sufficient reasons should be given for decisions reached using ODR or with the assistance of ODR, in particular the decisions reached with the involvement of AI mechanisms’; ‘20. Where national law allows for purely automated decisions, such decisions should be open to review before a judge.’

Paper in spring 2022.⁴⁵ These principles crystallise many of the ideas that have been proposed by other bodies, with a clear focus on human control.

These guidelines and recommendations have a heterogeneous content. In some cases, they are a reminder of certain limits that can already be deduced from human rights. In others, however, they go a step further and involve a choice in relation to an aspect that is dubious or controversial, insofar as it may constitute an obstacle to the supposed ‘efficiency’ (e.g., when it is proposed to recognise the right for an automated decision to be reviewable in any case by a human judge).

Such instruments are proving to be very useful at this early stage, when regulation is more of a necessity and a project than a reality. Their main drawback is obvious: although they are focused on the justice sector, they are very generic, even when they involve taking sides on a controversial issue. As a result, they fall short of meeting the requirements of legal certainty that are needed in an area such as this, where the rules of the game must be very clear.

3.3. Hard law

It is clear, therefore, that hard law rules – traditional rules, if preferred – will be needed to adequately address the challenges that the implementation of AI systems in civil justice will entail. Even though technological developments know no borders, it is up to national legislators – or supranational legislators with competences, such as the European Union – to make the big decisions: to decide what is prohibited and what is not; to determine what rights are attributed to litigants and, reflexively, what limits are imposed on AI; and, of course, to regulate in great detail the requirements and obligations to which AI systems that may have an impact on the development of the process and on decision-making must be subject.

The European AI-Act is a good example of a hard law standard for tackling the regulatory challenge from the perspective of certification and public control and, to that extent, it can serve as a model for other national legislators outside the EU.⁴⁶ Its content may undoubtedly be debatable, but the regulatory technique is interesting, because it establishes a homogeneous horizontal regime that can also be transferred to the field of justice. The same could be said regarding the Council of Europe Framework Convention, which has the advantage of being more specific in its scope – the impact of AI systems on human rights, democracy and the rule of law –, although its content remains vague and general.

It is therefore illusory to think that a regulation such as the one offered by the AI Act or the Council of Europe Convention will be enough to solve the regulatory problem. National procedural legislators have to make much clearer and more specific regulatory decisions for the sector of AI in Justice, because the provisions that can be deduced from the AI-Act or the Convention in this area are limited to establishing a very

⁴⁵ See n. 25.

⁴⁶ As already pointed out, Canada seems to be following a similar path (cf. *supra*, n. 39).

general framework, and constitutional rules will be insufficient to resolve the practical difficulties that could arise from the use by courts of AI systems without clear legal support. The case of *Loomis v. Wisconsin*⁴⁷ is a very clear illustration of the difficulties of dealing with these issues without specific regulation. And, no doubt, many other examples could arise in judicial practice for whose solution it would not be sufficient to simply verify that the AI system complies with the requirements established by the EU AI-Act.

4. A conclusion and two examples

The use of AI in civil proceedings affects procedural rights and safeguards and has an impact on the outcome of proceedings and thus on the material rights of citizens. National legislators have a big amount of work ahead of them and, above all, a big amount of decisions to make about what they want and what they do not want. Because AI promises a lot of efficiency, but at the price of costs and sacrifices. Good procedural law needs a legislator who knows about rights and safeguards, but also about how AI systems work. Two recent examples show the first attempts of domestic legislators to tackle these challenges.

4.1. The English Example

In England and Wales a soft law approach has been preferred to begin with. On 12 December 2023, the Courts and Tribunals Judiciary published a Judicial Guidance document, entitled *Guidance for responsible use of AI in Courts and Tribunals*.⁴⁸ The document aims to assist judicial office holders in relation to the use of AI. On the one hand, it identifies risks and issues, and provides suggestions for minimising them. On the other hand, the document includes potential (admissible) uses, recalling the judiciary's overarching obligation to protect the integrity of the administration of justice.

The guidance is focused on seven main areas of recommendation:

1. Understand AI and its applications
2. Uphold confidentiality and privacy
3. Ensure accountability and accuracy
4. Be aware of bias
5. Maintain security (e.g., using work devices and work email address to use AI tools).
6. Take Responsibility. The Guidance reminds judicial office holders that they are personally responsible for material produced in their name, even if an AI systems was used. But it also acknowledges that generative AI could be 'a

⁴⁷ 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S.Ct. 2290 (2017).

⁴⁸ Available at <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/>.

potentially useful secondary tool’ in judges’ preparatory work to produce a judgment

7. Be aware that court/tribunal users may have used AI tools (some indications that work may have been produced by AI are included)

In addition, guidance is provided in distinguishing potentially useful tasks and AI performed tasks that are not recommended. Among the first ones (potentially useful), the following are mentioned: summarising large bodies of text (taking care to ensure that the summary is accurate), writing presentations, and composing emails and memoranda. The Guidance, however, does not recommend using AI tools to carry out legal research or legal analysis.

The main goal, therefore, is to guide ‘institutional users’ of a AI systems and not to establish clear rules. It is probably just a first step, where the focus on the rights and safeguards of litigants is secondary: they are to be considered in an indirect manner, as a consequence of the recommendations and the rationale lying behind them.

4.2. The Spanish Example

Just a week later, the Spanish lawmaker followed the hard-law path in the Act regulating the use of ITC in the justice system (*Real Decreto-ley 6/2023*, of 19 December 2023),⁴⁹ in force since 20 March 2024. The scope of the Act is very broad and is primarily focused on electronic case management and virtual hearings, but the new Act has expressly admitted making recourse to AI technology in support of a swifter development of court proceedings, distinguishing between ‘automated’, ‘proactive’ and ‘assisted’ activities.

- (i) ‘Automated’ activities are defined as procedural activities carried out by a computer system without the need for human intervention (Article 56 of the Spanish Act). They are foreseen mostly for simple tasks related to the management of electronic court files (e.g., numbering or paging documents, generating copies or certificates, declaring that a decision is final because it has not been appealed within the legal time limit).
- (ii) Automated actions are labelled as ‘proactive’ when they are self-initiated by the system, without human intervention, taking advantage of the information in an electronic judicial file for a specific purpose (Article 56 of the Spanish Act), such as generating a notice that is automatically served on a party.

Automated and proactive activities aim to optimise the internal management of the court’s more bureaucratic tasks, although even the most ‘innocent’ administrative task may end up having an impact on the parties. Therefore, the Act imposes three requirements on these automated and proactive activities:

⁴⁹ Real Decreto-ley 6/2023, de 19 de diciembre, por el que se aprueban medidas urgentes para la ejecución del Plan de Recuperación, Transformación y Resiliencia en materia de servicio público de justicia, función pública, régimen local y mecenazgo, *Boletín Oficial del Estado* 20 December 2023, available at <https://www.boe.es/boe/dias/2023/12/20/>.

- They must all be identifiable as such, traceable and justifiable.
- It must be possible to carry out the same actions in a non-automated form.
- It must be possible to disable, revert or render ineffective the automated actions that have already taken place.

These provisions are in line with some of the rights that have been addressed previously and reflect, thus, the choices made by the Spanish lawmaker regarding ‘low profile’ use of AI in court proceedings. They all reflect the general idea of ‘human supervision’ or ‘human in command’: AI generated activities need to be traceable for the parties, in order to allow them to react against them and, where appropriate, to have them revoked or replaced in a non-automated manner.

- (iii) The third category are ‘assisted’ procedural activities, representing an additional step: the system generates a full or partial draft of a complex data-driven document, which may be produced by algorithms, and may form the basis or support for a court decision (Article 57 of the Spanish Act). The description is very broad and may encompass, among other examples, the drafting of an order for payment in order for payment proceedings or of a judgment upholding the claim in a simple eviction case. Most decisions could, at least in theory, undergo this first level of AI-generated draft, if the system has the data needed by the algorithm to produce it; and another aim of the new Act is having a data-oriented justice system, where the documents in all electronic court files are able to provide this sort of additional information.

As the qualitative impact is bigger, the safeguards imposed are larger:

- These drafts shall not be generated in a proactive manner, even if this could be technically possible: the draft will only be generated at the will of the user.
- The draft, additionally, has to be fully editable, i.e., they user shall be able to modify it freely and completely.
- In no case shall the draft in itself constitute a judicial decision, but shall require validation by the competent authority.

Once again, the ‘human oversight’ and ‘human on command’ approach prevails, as a clear policy choice by the Spanish lawmaker. These provisions do not eliminate completely the risk – perhaps the temptation – that the competent authority might tend to validate algorithmically generated drafts without further analysis, but at least they link decisions to specific individuals, not to ‘computer systems’ for which no one would ultimately be held responsible. It is part of the (legal and ethical) responsibility of ‘users’ to rigorously review drafts before validating them. And it is imperative to avoid that something similar to the examples of lawyers sanctioned for providing documents produced with generative artificial intelligence incorporating non-existent decisions could happen.

Bibliography

Nikolaos ALETRAS – Dimitrios TSARAPATSANIS – Daniel PREOȚIUC-PIETRO – Vasileios LAMPOS: Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. *PeerJ Computer Science*, 2:e93. (2016), available at: <https://doi.org/10.7717/peerj-cs.93>

Woodrow BARFIELD: *The Cambridge Handbook of the Law of Algorithms*, Cambridge, Cambridge University Press, 2020. <https://doi.org/10.1017/9781108680844>

Silvia BARONA VILAR: *Algoritmización del Derecho y de la Justicia. De la Inteligencia Artificial a la Smart Justice*. Valencia, Tirant lo Blanch, 2021.

Paul BEAUMONT – Peter McELEVAY: *The Hague Convention on International Child Abduction*. Oxford, OUP, 1999. <https://doi.org/10.1093/oso/9780198260646.001.0001>

Hannah BLOCH-WEHBA: Access to Algorithms. *Fordham Law Review*, 88, (2020), 1265–1314.

Jan DE BRUYNE – Cedric VANLEENHOVE (ed.): *Artificial Intelligence and the Law*. Cambridge, Intersentia, 2021. <https://doi.org/10.1017/9781839701047>

Ray W. CAMPBELL: Artificial intelligence in the courtroom: The delivery of justice in the age of machine learning. *Colorado Technology Law Journal*, 18, 2. (2020), 323–350.

André DAO: Human Dignity, the Right to be Heard, and Algorithmic Judges. *The British Yearbook of International Law*, (2020), 1–38. <https://doi.org/10.1093/bybil/braa009>

Angelo DONDI: Processo civile, new technologies e implicazioni etico-professionali. *Rivista trimestrale di diritto e procedura civile*, 3. (2019), 863–881.

Horst EIDENMÜLLER – Gerhard WAGNER: *Law by Algorithm*. Tübingen, Mohr Siebeck, 2021. <https://doi.org/10.1628/978-3-16-157509-9>

Eric A. ENGLE: An Introduction to Artificial Intelligence and Legal Reasoning: Using xTalk to Model the Alien Tort Claims Act and Torture Victims Protection Act. *Richmond Journal of Law & Technology*, 11, 1. (2004). <https://jolt.richmond.edu/vol-xi-issue-1/>

Benedict HEIL: *IT-Anwendung im Zivilprozess Untersuchung zur Anwendung künstlicher Intelligenz im Recht und zum strukturierten elektronischen Verfahren*. Tübingen, Mohr Siebeck, 2020.

Giampiero LUPO: 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), 75–96.

Jordi NIEVA FENOLL: *Inteligencia artificial y proceso judicial*. Madrid-Barcelona, Marcial Pons, 2018. <https://doi.org/10.2307/jj.26844203>

Jordi NIEVA FENOLL: Inteligencia Artificial y proceso judicial: perspectivas tras un alto tecnológico en el camino. *Revista General de Derecho Procesal*, (2022) 417–437.

Jordi NIEVA FENOLL: Online dispute resolution for small claims: is this the only realistic solution?. *Revista Ítalo-española de Derecho Procesal*, 1. (2022), 25–36.

Carla L. REYES – Jeff WARD: Digging into Algorithms: Legal Ethics and Legal Access. *Nevada Law Journal* 21, 1. (2020), 325–378.

Giovanni SARTOR – Karl BRANTING (ed.): *Judicial Applications of Artificial Intelligence*. Dordrecht, Springer, 1998. <https://doi.org/10.1007/978-94-015-9010-5>

Guillermo SCHUMANN BARRAGÁN: *Derecho a la tutela judicial efectiva y autonomía de la voluntad: Los contratos procesales*. Madrid-Barcelona, Marcial Pons, 2022.

Guillermo SCHUMANN BARRAGÁN: *Smart contracts* y tutela judicial. La incidencia de los contratos autoejecutables en la tutela judicial de los derechos y los intereses materiales de los justiciables. *Justicia: Revista de Derecho Procesal*, 2. (2021), 309–338.

Tania SOURDIN: Judge v. robot: Artificial intelligence and judicial decision-making. *University of New South Wales Law Journal*, 41, 4. (2018), 1114–1133. <https://doi.org/10.53637/ZGUX2213>

Richard SUSSKIND: *Online courts and the future of Justice*. Oxford, OUP, 2019. <https://doi.org/10.1093/oso/9780198838364.001.0001>

Darin THOMPSON: Creating new pathways to justice using simple artificial intelligence and online dispute resolution. *International Journal of Online Dispute Resolution*, 2, 1. (2015), 4–53. <https://doi.org/10.5553/IJODR/2352-50022015002001002>

Lisa TOOHEY – Monique MOORE – Katelane DARD – Dan TOOHEY: Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centred Design. *Macquarie Law Journal*, 19. (2019), 133–156. <https://doi.org/10.2139/ssrn.3438538>

Thomas WISCHMEYER – Timo RADEMACHER (ed.): *Regulating Artificial Intelligence*. Dordrecht, Springer, 2020. <https://doi.org/10.1007/978-3-030-32361-5>

John ZELEZNIKOW: Can artificial intelligence and online dispute resolution enhance efficiency and effectiveness in courts. *International Journal for Court Administration*, 8, 2. (2017), 30–45. <https://doi.org/10.18352/ijca.223>