

BEATA STĘPIEŃ-ZAŁUCKA

AI
AND THE EXERCISE
OF JUDICIAL AUTHORITY
EX MACHINA

Towards Efficient Artificial
Judiciary in a Democratic State

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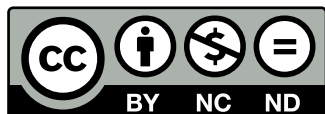
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Preliminary remarks

Artificial intelligence (AI) has the potential to improve the well-being of individuals and, more broadly, the well-being of humanity. Its contribution to the evolution of society has been reflected in the implementation and harmonisation of activities related to the economy, innovation and global productivity, among others.¹ This technological tool has found its way into many sectors, from manufacturing, finance and transport, to healthcare, security, law and public administration.² Today, the time has come to seriously consider whether artificial intelligence can support the judiciary, what the scope of this might be, and whether it is ready for judicial decision-making, which could prove to be an important remedy to the shortcomings of the modern justice system.³

Individual legal systems are already familiar with the first projects used in the judiciary based on artificial intelligence algorithms.⁴ With the progressively bold assumption that certain forms of artificial intelligence

¹ Haideer Miranda Bonilla, 'Algoritmos y Derechos Humanos' (2021) 71 *Revista de la Facultad de Derecho de México* 705.

² Paul Bennett Marrow, Mansi Karol and Steven Kuyan, 'Artificial Intelligence and Arbitration: The Computer as an Arbitrator — Are We There Yet ?' (2020) 74 *Dispute Resolution Journal* 35.

³ André Janssen, 'Der Robo-Richter auf dem Vormarsch in Europa?' (2022) 30 *European Review of Private Law* 517.

⁴ Luigi Lai, 'When and How Artificial Intelligence Can Help the Court's Day-to-Day Work' in Bogdan Fischer, Adam Pązik and Marek Śiwerczyński (eds), *Prawo sztucznej inteligencji i nowych technologii*, vol 2 (Wolters Kluwer 2022) 81-90.

can possess all the attributes available to the human mind,⁵ lawyers in many countries are increasingly wondering whether it is possible that artificial intelligence could one day replace the judge in his constitutional function of administering justice⁶ and become a (ro)bot judge.⁷ After all, artificial intelligence models to date have repeatedly demonstrated that they are able to process court files and predict the outcome of cases, create motives to justify a particular procedural decision or indicate the desired behaviour of an individual before the court.⁸ This, in turn, seems tempting, notably in the face of the everyday problems of the judiciary, especially related to the decreasing efficiency of judicial proceedings, longer waiting time for justice, a phenomenon that is growing in individual countries, raising significant doubts or even social unrest.⁹ The protracted wait for justice is today, unfortunately, a common feature of the legal systems of individual countries, including European countries, a problem that legislators are trying to deal with.¹⁰ One of the ‘elixirs’, according to many, is to be artificial intelligence.¹¹

⁵ Sascha Ossowski and Alberto Fern, ‘An Ontology for Value Awareness Engineering’ (2024) 16 Proceedings of the 16th International Conference on Agents and Artificial Intelligence 1421.

⁶ Cf., e.g. Žaklina Spalević and others, ‘The Role of Artificial Intelligence in Judicial Systems’ (2024) 12 International Journal of Cognitive Research in Science, Engineering and Education 561.

⁷ A ‘bot’ is software that performs certain tasks based on algorithms in the field of new technologies and the Internet, replacing humans, while a ‘robot’ in its broadest sense is a computer program that automates certain tasks. In the context of the area discussed in this book, a hybrid combination of both terms seems most appropriate, which consequently allows for the creation of a verbal contamination in the form of ‘(ro)bot judge’, a term which will be used below to refer to an artificial intelligence-based mechanism that aims to replace human judges in the field of justice.

⁸ Cf. Lydia Wolff, ‘Der menschliche Richter und sein verfassungsrechtlicher Wert - Eine neue Perspektive algorithmischer Konkurrenz’ in Philipp Reuß and Jessica Laß (eds), *Göttinger Kolloquien zur Digitalisierung des Zivilverfahrensrechts* (Universitätsverlag Göttingen 2024) 159-168.

⁹ Tomas McInerney, *When Should a Computer Decide? Judicial Decision-Making in the Age of Automation, Algorithms, and Generative Artificial Intelligence* (Queen’s University Belfast 2024) 21.

¹⁰ Jayanth K Krishnan and C Raj Kumar, ‘Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective’ (2011) 42 Georgetown Journal of International Law 748.

¹¹ Cf., e.g. Dorottya Papp, Bernadett Krausz and Franciska Zsófia Gyuranecz, ‘The AI Is Now in Session - The Impact of Digitalisation on Courts’ (2022) 7 Cybersecurity and Law 272; Cinara Rocha and João Carvalho, ‘Artificial Intelligence in the

However, as the past practice of using AI-based solutions in the judiciary, which dates back almost a decade, has shown, AI-based justice raises significant controversies regarding fundamental rights,¹² including in particular the right to a fair trial.¹³ This is not stopping the practice of law from developing artificial intelligence tools, using them on an ever-increasing scale by barristers, solicitors or individuals who seek to improve their litigation situation in this way. Attempts to influence the administration of justice with this are manifold, such as those described in the *Mata v. Avianca* case, pending in 2023 before the United States District Court of New York,¹⁴ where the attorney for one of the parties relied on false and thus misleading precedents generated by the chatbot based on artificial intelligence algorithm

Judiciary : Uses and Threats' (2022) 3399 CEUR Workshop Proceedings 1; Karolina Kiejnich-Kruk, 'Społeczne uwarunkowania wykorzystania sztucznej inteligencji w sądownictwie' (2023) 11-12 Przegląd Sądowy 68; Kinga Flaga-Gieruszyńska, 'Sztuczna inteligencja jako wsparcie dla arbitrażu - rzeczywistość czy iluzja?' (2024) 3 Polski Proces Cywilny 456; Zsanett Fantoly, 'Simplifying Criminal Proceedings Using Artificial Intelligence in Criminal Compliance' (2024) 33 Studia Iuridica Lublinensia 57; Vasily A Laptev and Daria R Feyzrakhmanova, 'Application of Artificial Intelligence in Justice: Current Trends and Future Prospects' (2024) 4 Human-Centric Intelligent Systems 394; Dovilė Barysė and Roeë Sarel, 'Algorithms in the Court: Does It Matter Which Part of the Judicial Decision - Making Is Automated?' (2024) 32 Artificial Intelligence and Law 117; Krisztina Karsai, 'The Use of Algorithms to Support Judicial Decision-Making in Criminal Matters with a Special Focus on Trial Decisions' (2025) 33 Studia Iuridica Lublinensia 103.

¹² Cf. Dirceu Pereira Siqueira, Fausto Santos de Moraes and Marcel Ferreira Dos Santos, 'Artificial intelligence and jurisdiction: analytical duty of grounds and the limits to the substitution of humans by algorithmics in the field of judicial decision theory' (2022) 43 Sequencia 1.

¹³ It should be noted that the legal nature of 'the right to a fair trial' is not uniform today, which can be seen not only in the many related terms used, but also in the translations of this term from foreign languages into English. It should be noted that terms such as 'the right to a court', 'the right to access to justice', 'the right to a speedy trial', 'the right to have a case examined without undue delay', 'the right to be tried without undue delay' or 'the right to effective judicial protection' etc. that appear in legal literature do not generally refer to a separate instrument, but are rather a more precisely defined element of 'the right to a fair trial', as will be discussed later. The individual terms appeared at different stages of development of the law in this area. Today, however, the term 'right to a fair trial' is more commonly used as a collective term, hence it will be used in this way below.

¹⁴ *US District Court, SD New York: 22 June 2023, Mata v. Avianca, Inc.* (2023) 678 F. Supp. 443.

(*ChatGPT*).¹⁵ The private sector makes extensive use of *LegalTech* tools,¹⁶ so one would think that the judiciary should also be prepared for it.¹⁷

There is no doubt that the assessment of respect for the guarantees of independence and impartiality of a judge, as well as the independence of courts using AI solutions, can be compromised, especially when there is a misuse of artificial intelligence in judicial practice. It is not without reason that the European Union AI Act¹⁸ identifies solutions related to the use of AI in the context of the judiciary as suspicious.¹⁹ According to Recital 61 of the EU AI Act, certain AI systems intended for the administration of justice and democratic processes should be classified as high-risk, considering their potentially significant impact on democracy, the rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial.²⁰ In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to be used by a judicial authority or on its behalf to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts. AI systems intended to be used by alternative dispute resolution bodies for those purposes should also be considered to be high-risk when the outcomes of the alternative dispute resolution

¹⁵ Christopher F Lyon, 'Fake Cases, Real Consequences: Misuse of ChatGPT Leads to Sanctions' (2023) 28 NY Litigator 8.

¹⁶ The term *LegalTech* refers to all technological solutions used by lawyers in their daily work, including AI. Cf. Jens Wagner, *Legal Tech und Legal Robots. Der Wandel im Rechtswesen durch neue Technologien und Künstliche Intelligenz* (Springer Gabler 2020) 19 ff.

¹⁷ Mariusz Załucki, 'LegalTech in the Judiciary: Technological Developments and the Future of the Court System' in Dariusz Szostek and Mariusz Załucki (eds), *Legal Tech. Information technology tools in the administration of justice* (Nomos 2021) 387-404.

¹⁸ 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, 2024/1689, 12.7.2024.

¹⁹ Isabel Kusche, 'Possible Harms of Artificial Intelligence and the EU AI Act: Fundamental Rights and Risk' (2024) 27 Journal of Risk Research 1.

²⁰ Marta Cantero Gamito and Christopher T Marsden, 'Artificial Intelligence Co-Regulation? The Role of Standards in the EU AI Act' (2024) 32 International Journal of Law and Information Technology 1.

proceedings produce legal effects for the parties. This Act also indicates, in relation to the concerns outlined, that the use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity.²¹ The classification of AI systems as high-risk should not, however, extend to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks.²² This is undoubtedly a very interesting point of view, especially since the EU AI Act is one of the first pieces of ‘hard law’ in the world that recognises the possibilities of artificial intelligence in relation to the administration of justice.

Although the concepts arising from the EU AI Act discourage this, observing the practice of many non-European countries, especially American and Asian, the scepticism of the European legislator cannot be accepted uncritically.²³ As legal practice shows, and as is evident from the jurisprudence of many national constitutional courts, the use of scientific and technological progress is a human right, recognised at the same time in many international instruments, such as the 1948 Universal Declaration of Human Rights (Article 27) or the 1996 International Covenant on Economic, Social and Cultural Rights (Article 15(1)(b)).²⁴ The right to a fair trial, which is defined at international and national level, also means, *inter alia*, the right to have a court case dealt with in a reasonable time.²⁵ Since artificial intelligence, at least *prima facie*, makes it possible to streamline judicial proceedings, its

²¹ Irina Carnat, ‘Addressing the Risks of Generative AI for the Judiciary: The Accountability Framework(s) under the EU AI Act’ (2024) 55 Computer Law and Security Review 1.

²² Henrik Junklewitz and others, *Cybersecurity of Artificial Intelligence in the AI Act* (Publications Office of the European Union 2023) 9 ff.

²³ Cf., e.g. Jack Kieffaber, ‘Predictability, AI, And Judicial Futurism: Why Robots Will Run The Law And Textualists Will Like It’ (2025) 48 Harvard Journal of Law and Public Policy (forthcoming); Straton Papagiannas, *Smart Courts, Smart Justice? Automation and Digitisation of Courts in China* (Universiteit Leiden 2024) 103 ff.

²⁴ Cf., e.g. the ruling of the Colombian Corte Suprema de Justicia of 10 October 2023, SC370-2023.

²⁵ Maciej Świder, *The Exercise of the Right to a Fair Trial in the Era of the COVID-10 Pandemic* (Peter Lang 2024) 50 ff.

functionality concerning the administration of justice²⁶ cannot be discarded, especially without an attempt to comprehensively examine the suitability of artificial intelligence algorithms for use in the administration of justice, including for judicial decision-making *ex machina*,²⁷ while respecting the standards of constitutional law.

Ex machina judicial decision-making, as may be thought, is a very tempting and at the same time questionable area which, if synchronised with the standards of constitutional law related to the exercise of judicial authority,²⁸ could prove to be an extremely important and significantly transformative tool for the administration of justice in democratic states.²⁹ Thus, it may prove to be an unexpected force, an event that saves a hopeless situation, a factor that allows the judiciary to overcome its current problems.³⁰ The protractedness of judicial proceedings, the long waits for years before the final conclusion of various conflicts, the handling of cases longer than necessary to clarify all their relevant circumstances³¹ - these examples illustrate the widespread negative perception surrounding the judiciary, which, according to some sources, may disappear irreversibly as a result

²⁶ Antônio Pereira Gaio Júnior and Fábila Antonio Silva, 'Direito, processo e inteligência artificial. Diálogos necessários ao exercício da jurisdição' (2023) 24 Revista Eletrônica de Direito Processual 60.

²⁷ Noemí Jiménez Cardona, 'Aplicación de la inteligencia artificial en la toma de decisiones jurisdiccionales (España)' (2023) 16 Revista Quaestio Iuris 1612.

²⁸ Melissa Patiño Cano, *Tecnologías de IA y Administración de Justicia: Reflexiones desde la Sentencia T-323 de 2024* (Universidad de Antioquia 2024) 3 ff.

²⁹ Laura Carrasquilla-Díaz, Alejandra De Luque-Pisciotti and Esteban Lagos-González, 'AI Adoption in Colombian Legal Practice: Challenges and Opportunities' (2024) 241 Procedia Computer Science 508.

³⁰ This concept is somewhat related to the phrase '*deus ex machina*', used by Euripides, one of the most prominent dramaturges of ancient Greece, to describe any situation where something unexpected or implausible is brought in to resolve a situation. One of the most famous examples illustrating this effect is related to Molière's play *Le Tartuffe ou l'imposteur*, when at the last moment, when the situation seems hopeless for the characters, an unexpected saviour appears, who solves the problem and brings a happy ending. Cf. Jean Baptiste Poquelin (Molière), *Le Tartuffe ou l'imposteur* (1669).

³¹ Igor Zgoliński, 'Complaint for Lengthiness of Proceedings in the Light of the Case Law of the European Court of Human Rights and Polish Legal Solutions' (2024) 30 Studii Juridice și Administrative 35.

of the development of artificial intelligence.³² This technology, thousands of times faster and more precise than a human being,³³ able to analyse the complex circumstances of a particular case, looking for normative patterns and analogous decisions in similar cases, proposing a specific decision in a given case or justifying this decision in a complex way,³⁴ is a picture of reality that is not at all a picture of the future. If sensitivity to emotions and the ability to evaluate are added to this picture, it would seem, at least *prima facie*, that algorithmic tools have already been developed to such an extent that they could also provide substantial support for human beings in the administration of justice, if not completely replace them.³⁵

This picture of algorithmic reality, found in many sectors of the economy,³⁶ while observing the shortcomings of the current justice system, has inspired research into the use of artificial intelligence in the judicial decision-making process. Since, in the opinion of many, efficient judiciary is an indispensable element of a democratic state under the rule of law,³⁷ it has become necessary to examine whether artificial intelligence is nowadays capable of becoming an element of the justice system due to its functionality, in accordance with the constitutional standards of the administration of justice,³⁸ thus enhancing the efficiency of the judiciary. This issue is addressed in this book, which seeks a number of answers to questions concerning this new stage in the development of the judiciary.

³² Cf. Ummey Sharaban Tahura and Niloufer Selvadurai, 'The Use of Artificial Intelligence in Judicial Decision-Making: The Example of China' (2022) 2 International Journal of Law, Ethics, and Technology 1.

³³ James Barrat, *Our Final Invention: Artificial Intelligence and the End of the Human Era* (Quercus Editions 2023) passim.

³⁴ Giulia Gentile, 'Artificial Intelligence and the Crises of Judicial Power: (Not) Cutting the Gordian Knot?' in Giovanni De Gregorio, Oreste Pollicino and Peggy Valcke (eds), *Oxford Handbook of Digital Constitutionalism* (Oxford University Press 2024) passim.

³⁵ Cf. Jack Kieffaber, Kimo Gandall and Kenny McLaren, 'We Built Judge. AI. And You Should Buy It' (SSRN, 2025) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5115184> accessed 30 March 2025; Kieffaber (n 23).

³⁶ Phil Wennker, *Künstliche Intelligenz in Der Praxis* (Springer 2020) 39 ff.

³⁷ Chibike Amucheazi and others, 'The Rule of Law and the Judiciary in Modern Democracies' (2024) 1 Nnamdi Azikiwe University Journal of Human Rights Law 117.

³⁸ Cecilia Rizcallah and Victor Davio, 'The Requirement That Tribunals Be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2022) 17 European Constitutional Law Review 581.

The main thesis of the research is the claim that artificial intelligence can meet the standard of independence inherent in courts and the standards of independence and impartiality inherent in judges, so that AI judicial decision-making *ex machina*, when the algorithm is properly constructed, will not violate the right to a fair trial.

This thesis is accompanied by the following research hypotheses: (1) the standard of independence inherent in courts and the standards of independence and impartiality inherent in judges need to be reinterpreted in relation to new technological developments, including in relation to the suitability of artificial intelligence to support the judiciary; (2) a number of existing tools used in the judiciary and based on AI algorithms do not meet the standard of independence inherent in courts and the standards of independence and impartiality inherent in judges; (3) the current state of development of artificial intelligence tools allows for the replacement of the human judge by AI algorithmic tools; (4) through AI algorithmic tools used in the judiciary, individuals would have a better guarantee of their right to access to justice, which could have a positive impact on the efficiency of the courts and, in particular, would help to make the right of access to justice a reality.

The primary aim of the study is also to seek answers to questions about the possible place of algorithmic tools of artificial intelligence in the administration of justice and about the possible legal and constitutional basis for the operation of such AI models whose task would be judicial decision-making. The point of reference is the current international and constitutional framework for the exercise of judicial authority, whose confrontation with the benefits of new technologies also seems to aim to demonstrate that the conditions that must be met for the judiciary to be attributed with the qualities proper to it change over time and must be revised in line with changing socio-political circumstances.³⁹

In order to achieve the stated objectives and answer the questions raised, the book is divided into chapters. After an introduction to the issues, the main focus of the analysis will be to explain why the constitutional and international bases for the exercise of judicial authority in a democratic

³⁹ Mahendra Pal Singh, 'Securing the Independence of the Judiciary - The Indian Experience' (2000) 10 *Indiana International & Comparative Law Review* 245, 248-249.

state should be a subject of comparative studies.⁴⁰ For it is impossible in today's world to look at the standards for the exercise of judicial authority through the prism of only one legislation. Already at this point, the concepts of judicial authority and the administration of justice and their place in the constitutional system are presented against the background of selected legal systems, in particular German, Spanish and Polish law, which, for many of the reasons indicated in the first chapter of the book, in recent years can and do constitute an important point of reference for the development of law in this field.⁴¹ The jurisprudential dialogue between constitutional courts and European tribunals will also be presented.⁴² These bodies are extremely important for shaping the European legal area, which may be significant, especially in the context of future disputes over artificial intelligence.

The second chapter of the book is, in turn, an attempt to reconstruct the contemporary attributes of courts and judges as conditions for the proper functioning of the judiciary in a democratic state.⁴³ It will present the sources and components of the right to a fair trial, a right whose realisation in today's world for the proper functioning of the judiciary is not in doubt.⁴⁴ This will allow not only to outline the standard of an independent court and the standards of an independent and impartial judge, but also to indicate the area of the main shortcomings of today's judiciary of individual states, the most serious of which is the inefficiency of judicial proceedings.⁴⁵

⁴⁰ Nicole Lazzerini, 'Please, Handle with Care! - Some Considerations on the Approach of the European Court of Justice to the Direct Effect of General Principles of European Union Law' in Laura Pineschi (ed), *General Principles of Law - The Role of the Judiciary* (Springer 2015) 145-170.

⁴¹ Zoltán Pozsár-Szentmiklósy, 'The Role of the Principle of Proportionality in Identifying Legal Capacity to Fundamental Rights' (2023) 32 *Studia Iuridica Lublinensia* 333.

⁴² Robert Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?' (2015) 33 *Nordic Journal of Human Rights* 1; Monika Haczkowska, *Model harmonijnej współpracy między Trybunałem Konstytucyjnym i sądami konstytucyjnymi państw członkowskich a Trybunałem Sprawiedliwości Unii Europejskiej* (Difin 2023) 192 ff.

⁴³ Rizcallah and Davio (n 38).

⁴⁴ Jordan Daci, 'Right to a Fair Trial Under International Human Rights Law' (2008) 4 *South East European University Review* 95.

⁴⁵ Martin Kuijer, 'The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings' (2013) 13 *Human Rights Law Review* 777.

The third chapter of the book will focus on explaining the concept of efficiency of judicial proceedings and highlighting why it is an essential condition for the proper functioning of the judiciary in a democratic state.⁴⁶ The negative consequences of inefficiency of judicial proceedings will be outlined and instruments to prevent inefficiency of court proceedings will be presented. One of the main suggestions in this regard will be to turn to artificial intelligence.

In order to assess the functionality of artificial intelligence in the field of improving the efficiency of the administration of justice, the fourth chapter will expose solutions based on artificial intelligence algorithms, which are known in the current judicial practice of many countries. It will be pointed out how they are built, why they serve in judicial proceedings, what their main advantages and basic deficits are, especially in the context of fundamental rights.⁴⁷ This is also where the current potential of artificial intelligence to make *ex machina* judicial decisions will be presented.

The fifth chapter of the book is, in turn, an exploration of the legal basis for the functioning of artificial intelligence in the judiciary, the principles for the creation of algorithms pretending to meet constitutional standards for the exercise of judicial power, including autonomous judicial decision-making *ex machina*, with an indication of the first types of cases in which it would be desirable to conduct the relevant tests, prior to the possible constitutionalisation of artificial judiciary.⁴⁸

In turn, the work ends with *de lege ferenda* conclusions and comments on the optimal path for the implementation of artificial intelligence into the

⁴⁶ Gustavo Ferro, Carlos A Romero and Exequiel Romero-Gómez, 'Efficient Courts? A Frontier Performance Assessment' (2018) 25 *Benchmarking: An International Journal* 3443.

⁴⁷ Nuno Sousa e Silva, 'Internet e Direitos Fundamentais: uma crescente interação' (2023) 35 *Revista de Direito e Estudos Sociais* 203.

⁴⁸ The term 'artificial judiciary' seems more correct than the sometimes used 'intelligent judiciary' to describe a judiciary based on artificial intelligence. The use of the latter term may give the wrong impression about the current state of the judiciary.

judiciary of the future,⁴⁹ where at least some categories of cases could be decided *ex machina*.⁵⁰

In this book, the literature on the subject, legislation and first appearing case law of several selected countries will be explored. While presenting the matter of AI in the judiciary, it is impossible to omit the law of the United States of America, where most of the popular AI judiciary tools have its origin, as well as the law and solutions of several other selected American and Asian countries where the use of AI tools in the judiciary is the order of the day. Nevertheless, the primary objective will be to analyse the law of selected European countries, including German law, Spanish law and Polish law. Turning to these legislations is justified for several reasons. One of them is the fact that the problem of judicial inefficiency is pointed out in these legal systems, with little interest in artificial intelligence as a possible remedy. Moreover, it is especially against the background of these three legal systems that the standards of courts independence and the independence and impartiality of judges have been intensively developed in recent years,⁵¹ which has taken place, inter alia, in the jurisprudence of national constitutional courts, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The latter two legal orders, i.e. the legal order of the Council of Europe as determined in particular by the content of the European Convention on Human Rights (ECHR),⁵² and the legal order of the European Union as determined by the EU Treaties (in particular the Treaty on European Union - TEU,⁵³ and the Treaty on the Functioning of the European Union - TFEU⁵⁴) and the EU Charter of

⁴⁹ Zichun Xu, 'Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities' (2022) 36 *Applied Artificial Intelligence* 1025.

⁵⁰ César Orlando Saavedra vera, Kelly del Rosario Jáuregui Bustamante and Luis Leoncio Arista Bustamante, 'La incidencia del sesgo algorítmico en la justicia predictiva del sistema judicial' (2023) 15 *Tzhoecoen* 79.

⁵¹ Csaba Cservák, 'Judicial Independence and Impartiality in a European Context' in Kinga Beliznai and Zoltan Megyeri-Palfi (eds), *Guarantees of judicial independence* (Patria Nyomda Zrt 2024) 203-228.

⁵² The Convention is available online at: <https://www.echr.coe.int/documents/d/echr/convention_ENG> accessed 30 March 2025.

⁵³ The Treaty is available online at: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012M/TXT>> accessed 30 March 2025.

⁵⁴ The Treaty is available online at: <https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj/eng> accessed 30 March 2025.

Fundamental Rights (CFR),⁵⁵ will be an obvious and indispensable element in the exploration of the standards of the exercise of judicial authority conducted.⁵⁶ The starting point will be constitutional law, international law and European law governing the right to a fair trial, right to access to justice and its consequences for the modern judiciary.

The work is, therefore, a comparative constitutional legal study directed towards those legal systems that constitute specific canons of modern constitutional law. Embedding it as broadly as possible in the doctrine, jurisprudence and legislation of individual states will ensure that the main objective of clarifying and outlining the optimal status of AI tools in court proceedings is adequately achieved. The work thus uses the classical methods of legal science to achieve the objectives set out in the introduction. Dogmatics and comparative legal analyses are supported by theoretical-legal and historical-legal considerations and, when necessary, by achievements of allied sciences related to legal sciences.⁵⁷

The abovementioned methods allowed to obtain research material which made it possible to formulate theoretical and legal conclusions relating to the constitutional law regulations governing the status of AI tools in court proceedings, to evaluate the practice against the background of these regulations in the light of the tendencies prevailing in the legal science and to draft *de lege ferenda* conclusions relating to it in the face of current and future challenges.

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⁵⁵ The Charter is available online at: <https://www.europarl.europa.eu/charter/pdf/text_en.pdf> accessed 30 March 2025.

⁵⁶ Yulia Razmetaeva, Yurii Barabash and Dmytro Lukianov, 'The Concept of Human Rights in the Digital Era: Changes and Consequences for Judicial Practice' (2022) 5 Access to Justice in Eastern Europe 41.

⁵⁷ Kazimierz Opalek, *Problemy metodologiczne nauki prawa* (Państwowe Wydawnictwo Naukowe 1962) 11 ff.

While writing this book, I received valuable advice from many people, all of whom I am unable to mention here, so that no one is left out. I discussed various aspects of the use of artificial intelligence in the judiciary with many lawyers and experts in this field from several continents, whom I would like to thank today.

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Beata Stępień-Załucka

Rzeszów-Las Palmas, 15 June 2025

Chapter 1. Constitutional and international bases for the exercise of judicial authority in a democratic state as a subject of comparative studies

1.1. General comments

The administration of justice as an area of state activity, an element of the judicial authority to settle disputes and conflicts over law, has undergone various transformations over the course of historical development. Initially belonging to the ruler's competence, it slowly evolved towards independence,⁵⁸ which became apparent, among other things, as early as the 15th century, when, for example, in the Polish-Lithuanian Commonwealth, the privilege *neminem captivabimus nisi iure victim* was issued, according to which the rule of law was to stand above the arbitrariness of the monarch and allow for the independence of the appointment of judges from the king and state dignitaries.⁵⁹ Nowadays, this is a standard without which it is difficult to imagine the smooth functioning of the state, as in modern constitutionalism, the courts and tribunals as one of the three independent authorities are the foundation of the political system, a guarantee of compliance with the idea of human rights and civil liberties.⁶⁰ Therefore, it is important that the courts and the judges adjudicating in them meet certain criteria that enable the realisation of such objectives.⁶¹ This remark is all the more important in

⁵⁸ Archibald Cox, 'The Independence of the Judiciary: History and Purposes' (1995) 21 University of Dayton Law Review 565.

⁵⁹ Beata Stepień-Zalucka, *Sprawowanie wymiaru sprawiedliwości przez Sąd Najwyższy w Polsce* (CH Beck 2016) 1 ff.

⁶⁰ Joseph J Darby, 'Garanties et limites à l'indépendance et à l'impartialité du juge aux États-Unis d'Amérique' (2003) 55 Revue internationale de droit comparé 351.

⁶¹ Mehrdad Payandeh, *Judikative Rechtserzeugung: Theorie, Dogmatik und Methodik der Wirkungen von Präjudizien* (Mohr Siebeck 2017) 10 ff.

the context of considerations regarding the possible significance of artificial intelligence in the justice system, if only because of the emerging calls for algorithms to replace human judges, including the need to find tools to restore efficiency to this area.⁶²

It should be recalled that over the course of the development of constitutional law, several standards have been developed in relation to the judiciary which today seem rudimentary.⁶³ It is primarily about the idea of the independence of the judiciary and the impartiality and independence of judges,⁶⁴ which is today referred to in individual national constitutions, regional acts of international law regulating the area of human rights or bilateral agreements.⁶⁵ There are also traces of this idea in Europe, particularly in the law of the Council of Europe bodies and in European Union law, although the latter's competence in the area of justice has recently been highly disputed. Within the framework of the various EU instruments, and particularly in view of the wording of Articles 2, 4(2) and 19(1)(2nd subparagraph) TEU and Article 47 CFR, the European Union has started to assume the need for a harmonious integration of its state structures and the rules on the administration of justice, which are sometimes referred to as EU justice standards.⁶⁶ A similar phenomenon can also be observed against the background of Article 6 of the ECHR, in the activities of the Council of Europe and especially of the European Court of Human Rights.⁶⁷ The problem with these standards, however, is that the individual national solutions to shape this EU standard are based on the different constitutional identities of the member states, which the EU in particular is also obliged to respect. For this reason alone, the development of a single EU standard

⁶² It is difficult to speak of such qualities today, when, in general, the length of court proceedings is increasing, with citizens waiting many years for their case to become final. Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 95 ff.

⁶³ Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021) passim.

⁶⁴ Mohamed Ali Mohamed Kotby, *Judicial Independence versus Judicial Impartiality a Comparative Approach* (Middlesex University 2022) 7 ff.

⁶⁵ Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annual Review of Political Science* 345.

⁶⁶ Nuria Magaldi Mendaña, 'La garantía de independencia del juez europeo: Una revolución encubierta del TJUE' (2022) 70 *Estudios de Deusto* 81.

⁶⁷ Kuijer (n 45) 777 ff.

appears to be extremely difficult, if not impossible, which, if only in the context of considerations of artificial intelligence in the administration of justice, may give rise to additional complications.

Significant doubts - against the background of the solutions functioning in the EU - are further raised by the fact that EU law does not comprehensively regulate the justice system of the European Union, not having (yet) adequate competence to do so. The existing regulations *in statu nascendi* are fragmentary and scattered in various normative acts and therefore do not facilitate either the modelling or the practice of justice.⁶⁸ The term 'judiciary' itself has not found its rightful place in EU legislation either. Much greater importance is attached to the need to ensure effective judicial protection in areas covered by EU law, which is served, among other things, by the case law of the Court of Justice of the EU. Its treaty objective is precisely to ensure respect for the law in the interpretation and application of the EU Treaties.⁶⁹ It should be remembered that artificial intelligence is an area in which the EU legislator has recently spoken out by adopting the EU AI Act in June 2024. However, this regulation lacks specific provisions as regards the area of judiciary, apart from indicating, *inter alia*, that certain AI systems for the administration of justice and democratic processes should be classified as high-risk, given their potentially significant impact on democracy, the rule of law, individual freedoms, as well as the right to an effective remedy and access to an impartial tribunal (recital 61 of the EU AI Act). However, these two areas - AI and judiciary - will increasingly intersect, which, as can be argued, will force further legal solutions.⁷⁰

In the countries of the European Union, however, there has recently been a certain disharmony in the perception of the justice system and the principles to which its organisation should be subject. This disharmony is due both to the actions taken by the European Union itself and its individual members. In recent years, this problem has become particularly apparent in the area of appointing judges at various levels of the judiciary, where different legal solutions adopted or being in force in individual EU countries have been increasingly controversial. These solutions were noticed by the public and at

⁶⁸ Roman Tokarczyk, 'Modelowanie wymiaru sprawiedliwości Unii Europejskiej na tle porównawczym' (2001) 3 *Studia Europejskie* 47, 47 ff.

⁶⁹ Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168.

⁷⁰ Carnat (n 21) 2 ff.

the same time provoked a search for reform and, above all, an appropriate standard that would meet the expectations of various circles and bodies, including the judiciary and EU bodies, as well as the bodies of the Council of Europe, whose competence it is to assess a given country's compliance with the rule of law. At the same time, the existence of an applicable EU standard in this area was questioned, emphasising, *inter alia*, the need for EU bodies to respect national distinctions.⁷¹

Particularly significant turbulence, both in the media and institutional space, can currently be observed in several EU countries, including in particular Spain, Germany and Poland.⁷² Various internal conflicts, subsequently transferred to the European arena, have become an element of a broader discussion aimed at searching for European standards of jurisprudence, attempts to model European judiciary, in which the two most important European tribunals (ECtHR and CJEU) have participated. In turn, part of these disputes concerned the sources of the judiciary's authority, including the method of filling judicial positions.⁷³ For this reason alone, it is worth taking a look at selected legal orders and considering how, and if at all, the concepts emerging in these countries may shape the European standard of administration of justice, also in the context of its use of artificial intelligence and the replacement of the human judge by an algorithm. This will be the core of this chapter, the aim of which is to find answers to questions such as the purpose of comparative research into the administration of justice in European countries.

⁷¹ Cf., e.g. Christian Hillgruber, 'The Rule of Law, the Guarantee of the Independence of Judges and the Appointment or Election of Judges - A German and European Perspective' in Kinga Beliznai and Zoltan Megyeri-Palff (eds), *Guarantees of judicial independence* (Patria Nyomda Zrt 2024) 43-49.

⁷² Dorota Zabłudowska, 'The Battle for Judicial Independence in Poland, 2017-2022' (2022) 2022 *Giornale di Storia Costituzionale* 29; Michał Celiński, 'Independence of Courts and Judges in Germany and the Land of Thuringia in Light of the Case Law of the Court of Justice. Case Study - Analysis of the Reference for a Preliminary Ruling Brought by Landgericht Erfurt in the Case A.G.E. p. BAG (C-276/20)' (2023) 1 *International Law Quarterly* 55; María Valle Camacho, 'El derecho a un tribunal establecido por ley y el procedimiento de nombramiento judicial: nuevos desarrollos a través de la jurisprudencia del TEDH y del TJUE. Su aplicación al caso de Polonia' (2023) 68 *Cuadernos Europeos de Deusto* 19.

⁷³ Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 *Hague Journal on the Rule of Law* 353.

It should be added that among the assumptions of comparative research on legal institutions is the adoption of the position that legal systems, legal institutions, rules and norms of different systems are comparable with each other if they meet certain criteria.⁷⁴ This is particularly illustrated by rules (norms, institutions) that are united by, for example, their area of application or regulation, their purpose or their function in the legal system.⁷⁵ They are comparable both in the case of universally applicable and valid law and in the case of historical regulations - norms that have already been derogated from. Comparative law is based on comparing different legal systems or their institutions, norms or provisions. It serves not only to understand and compare the content of provisions, their interpretation, as well as their application or functioning in the social space, but also, and most importantly, to select legal solutions in order to obtain the most effective law that meets the goals and objectives of the legislator,⁷⁶ which, especially in the context of the search for an EU legal standard - in one area or another - seems desirable. Nowadays, legal systems are moving towards unification at a different pace, at least in terms of the literal wording of provisions. The countries of the European Union seem to be an ideal example. The unification or harmonisation of certain branches of law paradoxically does not result in a single, identical system of law for all EU countries.⁷⁷ Legal comparativism in this respect has not become and will not become redundant but has gained a *sui generis* field for scientific research.⁷⁸ After all, it is impossible not to mention that in both unification and harmonisation, it is not only the content of a provision that should be examined, but also the manner of interpretation based on native legal tradition and the practice of applying provisions or

⁷⁴ Iwona Szymczak, 'Metoda nauki o porównywaniu systemów prawnych' [2014] *Ruch Prawniczy Ekonomiczny i Socjologiczny*.

⁷⁵ Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2019) *passim*.

⁷⁶ Clive M Schmitthoff, 'The Science of Comparative Law' (1939) 7 *Cambridge Law Journal* 94.

⁷⁷ Günter Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit* (Edward Elgar) 25 ff.

⁷⁸ Sergio Bartole, 'Comparative Constitutional Law - an Indispensable Tool For the Creation of Transnational Law' (2017) 13 *European Constitutional Law Review* 601.

institutions.⁷⁹ The issue of AI, which is currently in its infancy in the judiciary, is already aspiring to become an area that should be harmoniously regulated in the future, if only at European level.

In such a light, in order to seek answers as to the possibility of a single standard in European judiciary (present and future), it becomes necessary to analyse the national foundations shaping this European area at the same time. An in-depth analysis of national law at a general level may allow - as can be tentatively thought - possibly further research on specific solutions, including the potential of artificial intelligence to be applied to judiciary against the background of national concepts.

1.2. The concepts of the judiciary, the administration of justice and their place in the political system of selected countries

The discussion of the judiciary and the administration of justice in the selected countries should begin with a reporting reminder of the constitutional solutions creating the basis for the functioning of the judiciary in these countries. There is no doubt (or at least this is the assumption on which the following remarks are based) that Spain, Poland, and Germany are countries where the fundamental laws play the most important role in creating the framework for the functioning of the judiciary and the legal status of judges. Constitutions, as legal acts of the highest rank, define the constitutional status of the judiciary, placing it alongside the legislature and the executive as one of the state authorities to be exercised on the basis and within the limits of the law.⁸⁰

It is worthwhile to start the discussion of individual constitutional solutions - in general terms - with an overview of the functioning of the judiciary in Germany, where the Basic Law currently regulating these issues (*Grundgesetz für die Bundesrepublik Deutschland*) was enacted the earliest of the countries discussed in detail within this book, i.e. 23 May 1949.⁸¹

⁷⁹ Cf., in detail: Paweł Szklarczyk, 'Komparatystyka prawnicza a metoda historyczna na przykładzie badań nad reformami prawnymi okresu Meiji' (2020) 14 Wrocławskie Studia Erazmiańskie 122.

⁸⁰ Mark Tushnet, 'Political Power and Judicial Power: Some Observations on Their Relation' (2006) 75 Fordham Law Review 755.

⁸¹ This refers to the period of enactment of the current constitution, not the earliest constitution in the states in question, which has already been derogated. It is known that the constitution in Poland was the oldest in Europe. Jerzy Lukowski, 'Recasting

The general constitutional principles concerning the functioning of the state did not feature prominently in the German Basic Law, as in this respect they had to give way to the principle of respect for human dignity and the protection of fundamental rights. These principles were only regulated in the second chapter of the German Basic Law: 'Federation and the Länder'.⁸²

According to Article 20(1) of the German Basic Law, the Federal Republic of Germany is a democratic and social federal state in which all state power is derived from the people (Article 20(2) 1st sentence of the German Basic Law). It is exercised by the people through elections and votes and by special legislative, executive and judicial bodies (Article 20(2) 2nd sentence of the German Basic Law). The legislature is bound by the constitutional order, the executive and the judiciary by statute and law (Article 20(3) of the German Basic Law). Pursuant to Article 92 of the German Basic Law, the judicial power is vested in the judiciary; it is exercised by the Federal Constitutional Court, by the federal courts provided for in the Basic Law and by the courts of the Länder.

Germany's general constitutional principles thus include the principle of a democratic and social federal state, the principle of the sovereignty of the people (democracy), the principle of the tri-partition of power and the principle of the rule of law. In turn, an element of the separation of powers is the recognition of the judiciary as a separate authority.⁸³ In doing so, the German Basic Law does not expressly indicate that it is for the courts and tribunals to administer justice. It does, however, imply this indirectly through the title of its ninth chapter (*Die Rechtsprechung*).

As pointed out in the German doctrine, the constitutional-legal basis for the judiciary is very general, based on the guarantee of independence, which is the main focus of legal discourse.⁸⁴ The very principle of the tri-partite division of power is intended to exclude arbitrariness of the state and abuse of power by state organs, thus protecting human dignity and freedom. The realisation of this objective is not possible if one organ of

Utopia: Montesquieu, Rousseau and the Polish Constitution of 3 May 1791' (1994) 37 Historical Journal 65.

⁸² Magdalena Bainczyk, 'Wpływ Europejskiej konwencji praw człowieka na interpretację praw podstawowych w RFN' (2017) 4 Krakowskie Studia Międzynarodowe 36.

⁸³ Helge Sodan, *Grundgesetz. Kommentar* (CH Beck 2024) *passim*.

⁸⁴ Fabian Wittreck, 'Dritte Gewalt im Wandel - Veränderte Anforderungen an Legitimität und Effektivität?' (2015) 74 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 115, 133 ff.

power is dependent on another organ of power, and the guarantee of judicial independence under Article 97(1) of the German Basic Law is therefore a direct consequence of Article 20(2) 2nd sentence of the German Basic Law. At the same time, German doctrine points out that in every system of government a variety of links have developed between the organs of state power which stand in the way of a consistent separation of state powers. One can even speak of a principle of interconnection between organs of state power.⁸⁵

In the view of the German Federal Constitutional Court (*Bundesverfassungsgericht*), in a system of divided powers with regard to the courts, it is difficult to speak of a complete or absolute separation and that, therefore, a kind of tilting of the courts towards the legislature is most permissible.⁸⁶ The necessity of the exercise of justice by specific organs of the state such as the courts prohibits an excessively close connection between the judiciary and the executive. However, this does not mean that any relationship between the judicial and executive powers, or even more so between the judicial and legislative powers, is absolutely prohibited. At the heart of the systemic position of the courts, in the Federal Constitutional Court's view, is the existence of a personal separation (*incompatibilitas*), which should be shaped in such a way that judicial independence is not called into question.⁸⁷

In the Federal Constitutional Court's view, the separation of the judiciary from the legislature is relative. This is because: (1) it is parliament that enacts the laws to which judges are subject; (2) it is parliament that determines by law the constitution of the courts; (3) it is parliament that regulates by law the appointment of judges and the recruitment of all judicial personnel; (4) it is parliament that details by law the status of a judge, including the principle of his or her responsibility; (5) it is parliament that determines by law the amount of financial outlays for the courts and judges, thereby influencing their factual situation by setting the limits of financial autonomy. Furthermore, the Federal Constitutional Court notes that there is nothing to prevent, for example, punitive measures against judges being laid down by law. Thus, for example, German criminal law allows a judge to be punished with a prison sentence of between one and five years for the

⁸⁵ Magdalena Bainczyk, *Selected Legal Aspects of Judicial Independence in the Federal Republic of Germany* (Instytut Zachodni 2019) 14-15.

⁸⁶ *Bundesverfassungsgericht*: 9 May 1962, 2 BvL 13/60 (1962) BVerfGE 14.

⁸⁷ *Bundesverfassungsgericht*: 3 June 1980, 1 BvL 114/78 (1980) BVerfGE 54.

offence of deliberately bending the law in favour of or against a party in the administration of justice.⁸⁸ As a result, German doctrine recognises that the set of constitutional links between courts and judges and the legislature makes it possible to speak of a certain preponderance of the legislature in relation to the judiciary.⁸⁹

Such a regulation, as one may think, has connections with the mode and period of the enactment of the German Basic Law, in circumstances which aimed at the rapid restoration of justice after a period of lawlessness (Third Reich).⁹⁰ Thus, although it is assumed to be incompatible with the Basic Law to influence the judicial activity not only of the legislature and the executive, but also of third parties, it mentions the necessary appropriate distance of the judge, e.g. political activity of judges is allowed - as can be seen from the Federal Law of 8 September 1961 on the status of judges⁹¹ (*Deutsches Richtergesetz*, DRiG).⁹² In reality, therefore, the status of the judiciary in Germany is more complex than it appears at first glance, as will be mentioned many more times.⁹³

⁸⁸ Cf. Luís Greco, 'Richterliche Macht ohne richterliche Verantwortung: Warum es den Roboter-Richter nicht geben darf' (2020) 11 Rechtswissenschaft 29.

⁸⁹ Helge Sodan, 'Der Status Des Richters' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol 5 (C F Müller 2007) § 113.

⁹⁰ The German Basic Law was intended to be provisional, as can be seen, for example, from the wording of its Article 146: This Basic Law, once the unity and freedom of Germany has been realised and is binding on the whole of the German people, will cease to have effect on the day on which a constitution adopted by a free decision of the German people comes into force. Despite the significant constitutional changes involving the gradual regaining of full sovereignty by the Federal Republic of Germany until the reunification of the two German States, which formally took place on the basis of Article 23 of the German Basic Law in its non-binding wording, the German people neither enacted a new constitution nor even renamed the German Basic Law.

⁹¹ Which was given its current essential wording on 19 April 1972, last amended on 22 October 2024 (Bundesgesetzblatt 2024, No. 320).

⁹² Cf., e.g. § 4, § 36 and § 39 of the *Deutsches Richtergesetz*. For a critical discussion of this, cf. Andreas Voßkuhle, 'Extremismus im Öffentlichen Dienst - Was tun?' (2022) 24 Neue Zeitschrift für Verwaltungsrecht 1841, 1844 ff.

⁹³ Cf. Joachim Wagner, 'Juristisches Neuland - über den Umgang von Richterdienstgerichten mit AfD-, Richtern und -Staatsanwälten' (2023) 76 Neue Juristische Wochenschrift 501.

Under Article 98(1) of the German Basic Law, the legal status of federal judges is determined by a separate federal law, while under Article 98(3) of the German Basic Law, the legal status of judges in the Länder is determined by separate provincial laws. It is therefore the provisions of the individual laws which must regulate the organisation of the judiciary in detail, thus implementing the relevant constitutional principles.

An interesting peculiarity of German constitutional law in the area under discussion is the lack of constitutionalisation of the judicial council. In turn, as is well known, judicial councils can be an important link in the justice system. However, in Germany, in this respect, a great deal of leeway has been left to the Länder, where only half of them have chosen to set up a body to which the functions of the judicial council belong (above all with regard to the selection of candidates for judicial posts). This is a possibility under Article 98(4) of the German Basic Law, against the background of which it is sometimes argued in German doctrine that such bodies threaten the independence and impartiality of the judiciary through the extra-partisan influence of parties and judicial associations on the judicial appointment process and should therefore be abolished.⁹⁴ In the latter area (appointment of judges), on the other hand, the representatives of the executive have important competences, whose role and the tasks related to the discharge of that role fundamentally link the executive to the judiciary. This distance to the executive, as will be discussed later, is important in the context of the most important qualities of a judge - independence and impartiality. In doing so, the executive is central to the procedure for the appointment of judges.⁹⁵

German doctrine has, for some time, been discussing the current state of law arising from constitutional arrangements relevant to the assessment of the correctness of the source of the judicial authority. The current solution is criticised, although there is no shortage of those who argue that the introduction of a body along the lines of a judicial council would be a mistake that would undermine the legitimacy of the judiciary. The issue is certainly not yet closed in the discussion, and in the context of future technological

⁹⁴ Fabian Wittreck, 'Empfehlen sich Regelungen zur Sicherung der Unabhängigkeit der Justiz bei der Besetzung von Richterpositionen?', *Gutachten G zum 73. Deutschen Juristentag* (CH Beck 2020) 93.

⁹⁵ Heinrich Amadeus Wolff, 'Criteria and Procedure for the Election of Court Judges in the Light of the German Basic Law' in Maciej Małolepszy (ed), *Criteria and Procedure for the Election of Common Court Judges in Selected European Countries* (C H Beck 2020) 7.

transformations of the judiciary, the arguments that emerge may be relevant from the perspective of the algorithmisation of this space.

According to Article 33(2) of the German Basic Law, every German according to his or her abilities, qualifications and professional achievements has equal access to any public office. 'Public offices' therefore include the office of a judge, and the current wording of the German Basic Law seems to imply that only people - as natural persons - can hold public office. Nevertheless, German academia is increasingly boldly noting that the times when state power can only come from public functionaries (humans) are no longer so obvious, and that an automated decision based even on algorithms may in principle be 'conceivable' in the judiciary.⁹⁶ It is claimed in this area, among other things, that the state administration in this country already uses *de facto* document generators and that administrative acts can be issued entirely by means of algorithmic devices. The provision allowing this is, for example, § 155(4) Fiscal Code of Germany (*Steuerfestsetzung*), which states that based on the information at their disposal and the information furnished by the taxpayer, revenue authorities may use fully automated processes to conduct, correct, withdraw, revoke, cancel or amend (a) tax assessments as well as (b) credits of withheld taxes and prepayments, provided there is no cause for an individual case to be processed personally by an official. Similar solutions can be found in other areas of the German administration. In civil proceedings, for example, an automated form of writ-of-payment procedure (the so-called *Mahnverfahren*) has been introduced in German law. It consists of a fully automated recognition of the case and order for payment, where the issuance of a payment order does not require 'human intervention' as its content is generated by an intra-court computer system.⁹⁷

In this context, it is noted, *inter alia*, that appropriate solutions based on artificial intelligence in the judiciary may be hindered by the provision of Article 92 of the German Basic Law, according to which judicial power is entrusted to judges, which, according to some commentators, is supposed

⁹⁶ Lydia Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (Universität Trier 2022) 136.

⁹⁷ A distinguishing feature of the German model of this procedure is that in the vast majority of courts the process of verification of the claim, preparation and drafting of the order for payment (including its issuance and delivery to the claimant) is handled by an automated intra-court system that operates autonomously without the participation of the human factor. Cf. Uwe Salten and Karsten Gräve, *Gerichtliches Mahnverfahren and Zwangsvollstreckung* (Verlag Dr Otto Schmidt 2013) 5 ff.

to imply the personal nature of the exercise of this power. It is sometimes pointed out, however, that the term 'personal character' does not necessarily refer to the human character of the judge. Rather, the phrase is supposed to refer to the fact that the Basic Law does not assign the task of administering justice to the institutions of the courts, but explicitly to the judges individually. This kind of assignment of tasks by the Basic Law stands, as it were, in opposition to some other legal systems, as well as international and European regulations, which understand the administration of justice rather as an institutional task.⁹⁸ However, this is - as one may think - due to a certain symbolism related to the historical development of the German judiciary, and - as is sometimes pointed out - is not a sufficient basis for creating an exclusively human image of the judge, it is rather meant to be a reference to the general concept of the judge as an individual subject of state power.⁹⁹

The source of the origin of judicial authority is the people. In Germany, Article 20(2) of the Basic Law, which expresses the principle of the sovereignty of the people, referred to in German legal science as the principle of democracy, is crucial in this regard.¹⁰⁰ It means that the judge exercises authority on behalf of the people and should therefore have democratic legitimacy (granted by the people). This democratic legitimacy should cover both material and personal-organisational issues. With regard to organs belonging to different types of state power, material and personal-organisational legitimacy are of varying degree and nature, but in each case it must ensure the effective influence of the people on the exercise of power.¹⁰¹ In German doctrine, the theory of an unbroken chain of democratic legitimacy (*Legitimationskette*) emerges in this context. According to this theory, which is also applied by the German Federal Constitutional Court, anyone exercising state power must be individually appointed by the people or by bodies appointed by the people. The level of legitimacy should be higher the more important the decision to be taken.¹⁰²

⁹⁸ Christian Hillgruber, 'Art. 92' in Teodor Maunz and others (eds), *Grundgesetz. Kommentar* (CH Beck 2025) beck-online.

⁹⁹ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 25) 138.

¹⁰⁰ Michael Sachs, *Grundgesetz. Kommentar* (CH Beck 2024) 794 ff.

¹⁰¹ Magdalena Bainczyk, *Wybrane aspekty statusu prawnego sędziów w RFN z perspektywy instytucji unijnych* (Instytut Zachodni 2024) 74 ff.

¹⁰² Bodo Pieroth, 'Das Demokratieprinzip des Grundgesetzes' [2010] *Juristische Schulung* 473, 481.

This issue was addressed by the German Federal Constitutional Court, among others, which stated in its judgement that the democratic legitimacy required by constitutional law requires an unbroken chain of legitimacy from citizens to the bodies and officials entrusted with state tasks.¹⁰³ In the context of judicial authority, a distinction is made between, *inter alia*, democratic legitimacy for the administration of the courts and democratic legitimacy for adjudication. The latter consists in defining the scope of this power in laws and, although it should be linked to accountability to the sovereign, it cannot be exercised in the same way as in the case of the legislative and executive branches, due to the principle of judicial independence.¹⁰⁴ Significant doubts therefore arise in the context of the automation of judicial decision-making, *inter alia* as to how to satisfy this constitutional value. Among other things, it is argued that it is precisely the exercise of state power in the form of a sovereign act that must be considered a matter requiring legitimisation.¹⁰⁵ Therefore, if the legislator decided to entrust algorithmic judges with the competence to apply the law in court, the legislator would be authorised to do so solely on the basis of its own legitimacy. All technological means, including but not limited to artificial intelligence, if they serve to implement the will of the sovereign, can therefore find their way into the judicial authority system, as long as they serve the citizens, provided they are legitimised by the citizens.¹⁰⁶ Certainly, this observation, especially in the context of possible applications of artificial intelligence, seems extremely interesting.

Only with these comments, the German model seems to be an excellent example, where one can see some links between the judicial power and the legislative and executive powers, which seems to be particularly interesting in the context of the origins of judicial power, also with the use of new technologies. This alone raises further questions about the feasibility and effectiveness of the search for a common European model of an independent and impartial judge based on artificial intelligence algorithms. The signal coming from Germany, at least *prima facie*, points to the possibility of

¹⁰³ *Bundesverfassungsgericht: 15 February 1978, 2 BvR 134/76, 2 BvR 268/76 (1978) BVerfGE 47.*

¹⁰⁴ Fabian Wittreck, *Die Verwaltung der Dritten Gewalt* (Mohr Siebeck 2016) 125 ff.

¹⁰⁵ Viktoria Herold, *Demokratische Legitimation automatisiert erlassener Verwaltungsakte* (Duncker & Humblot 2020) 95 ff.

¹⁰⁶ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 25) 223.

a significant opening of the judiciary to the area of new technologies. This will, of course, be the subject to further analysis.

Against this background, some differences in Spanish law can be seen. The Spanish Constitution (*Constitución Española*) of 27 December 1978 already indicates, in Article 1(2), that national sovereignty belongs to the Spanish people, from which the authorities of the State derive. In doing so, the Constitution naturally also presupposes the tri-partite division of state powers, while emphasising that the administration of justice comes from the people and is exercised in the name of the King by judges, who constitute judicial authority, who are independent, irremovable, accountable and subject only to the law (Article 117(1) of the Spanish Constitution). The Constitution also emphasises that the exercise of justice in all types of trials, both in terms of sentencing and ensuring the execution of the judgment, belongs exclusively to the courts and tribunals established by the laws that determine their jurisdiction and rules of procedure (Article 117(3) of the Spanish Constitution). The courts shall only perform the functions indicated in the Constitution and expressly entrusted to them by law to guarantee each power (Article 117(4) of the Spanish Constitution).¹⁰⁷

The regulation in question means that the judicial authorities do not perform any functions other than those entrusted to them by law as a guarantee of any right. Indeed, Article 117(4) of the Spanish Constitution expressly prohibits them from doing so. At the same time, it also follows that neither of the other two segments of authority may exercise judicial functions, which includes, inter alia, the organs of the legislature, which, for example, under Article 76 of the Spanish Constitution, are authorised to set up commissions of inquiry.¹⁰⁸ The purpose of the constitutional regulation is to prevent the exercise of jurisdiction by other types of bodies that carry out their activities without the protection of constitutional guarantees. The Spanish Constitution conceives of the independence of judges and the independence of the courts in relation to influences and pressures from outside the judiciary, as a type of legal independence, according to which the constitutionally guaranteed content of a judge's independence includes

¹⁰⁷ María Del Pilar Teso Gamella and Ángel Arozamena Laso, 'Artículo 117' in Pablo Perze Tremps, Alejandro Saiz Arnaiz and Carmen Montesinos Padilla (eds), *Comentario a la Constitución Española. 40 Aniversario. Libro-Homenaje a Luis López Guerra. Tomo II* (Tirant lo Blanch 2018) 1657 ff.

¹⁰⁸ Enrique Sánchez Goyanes, *Constitución española comentada* (Ediciones Paraninfo 2004) 132 ff.

the power to interpret the law as he or she wishes, without the possibility of being forced to reason in any other way.¹⁰⁹ It is not possible to hold a judge accountable for legal views.

The constitutional regulation of judicial authority in Spain, is not identified with a single body, but is assigned to each of the jurisdictional bodies indicated. The jurisdictional power is entrusted to the judges, each of whom exercises jurisdiction in their respective courts. In this sense, the members of the judicial authority are all judges who exercise jurisdictional functions.¹¹⁰

It follows from the wording of Article 24 of the Spanish Constitution that the state is to ensure the right to receive effective protection of judges and courts in the exercise of their rights and legitimate interests. Under no circumstances may anyone be deprived of the possibility to assert their rights (Article 24(1) of the Spanish Constitution).¹¹¹ They shall be guaranteed the right to a court of law previously determined by law, to a defence and to the presence of a lawyer, to be notified of the accusation formulated against them, to an open trial without undue delay and with all guarantees, to the use of appropriate means of proof for their defence, not to testify against themselves, not to confess guilt and to the presumption of innocence. The law is also intended to define the cases in which, due to kinship or professional secrecy, there is no obligation to testify to facts which may be presumed to constitute criminal acts (Article 24(2) of the Spanish Constitution).

In Spanish legal science, in view of the current wording of the Spanish Constitution, it is pointed out that the power of judges is subject to fundamental rights and the Constitution which guarantees them. It is therefore emphasised that judges must apply the law in accordance with constitutional principles.¹¹² The exercise of judicial power is therefore based on a series of constitutional principles that serve as a guide for the interpretation of the law, while constituting a parameter of constitutionality

¹⁰⁹ Tomás Vives Antón, 'Introducción' in Miguel Rodríguez-Piñero y Bravo Ferrer and María Emilia Casas Baamonde (eds), *Comentarios a la Constitución Española XL aniversario* (Madrid: Boletín Oficial del Estado 2018) 643.

¹¹⁰ Del Pilar Teso Gamella and Arozamena Laso (n 36) 1659.

¹¹¹ Alicia González Alonso, 'Artículo 24.1' in Pablo Perze Tremps, Alejandro Saiz Arnaiz and Carmen Montesinos Padilla (eds), *Comentario a la Constitución Española. 40 Aniversario. Libro-Homenaje a Luis López Guerra. Tomo I* (Tirant lo Blanch 2018) 531 ff.

¹¹² Antón (n 38) 645-646.

of the law, being a limit that the legislature may not exceed when regulating the exercise of judicial power. The aforementioned Article 117 of the Spanish Constitution contains a list of constitutional principles that regulate and condition who exercises judicial power. These are therefore constitutional principles that affect the Spanish organisation of the judiciary.¹¹³

The Spanish Constitution also provides for the principle of unity of the judiciary, which, according to its wording, constitutes the basis for the organisation and functioning of the courts (Article 117(5) of the Spanish Constitution). It presupposes the existence of a single, coherent system, bringing together all the organs of this branch of state power within a common legal and organisational framework. It also implies that only independent judges, acting within the organs of judicial authority, have the right to exercise that power. The purpose of this principle is to prevent the existence of extrajudicial jurisdiction. It should be added in this regard that Article 149(1)(5) of the Spanish Constitution provides that the state has exclusive jurisdiction over the judiciary, a provision which is of particular relevance in relation to the parliaments of the Spanish autonomous communities (which concerns the division of competences between the state and the autonomous communities).

And according to Article 127(1) of the Spanish Constitution, active judges may not hold other public office or belong to political parties or trade unions. In doing so, the law establishes the system and methods of professional association of judges and public prosecutors, while creating a system of non-combination of the functions of members of the judiciary with other functions, which should ensure their complete independence (Article 127(2) of the Spanish Constitution).

According to the constitutional provisions, it is the organic law (*ley orgánica* - a type of legal act which, according to the Spanish law, is situated between the constitution and the ordinary acts) on the judiciary that must determine the creation, functioning and organisational structure of the courts and tribunals, as well as the legal status of the professional judges who form a single corporation and the status of the auxiliary personnel of the administration of justice (Article 122(1) of the Spanish Constitution). In the commentators' view, what is at stake is the unequivocal determination

¹¹³ Ignacio Díez-Picazo Giménez, 'Artículo 117' in Miguel Rodríguez-Piñero y Bravo Ferrer and María Emilia Casas Baamonde (eds), *Comentarios a la Constitución Española XL aniversario* (Madrid: Boletín Oficial del Estado 2018) 647.

that the regulation of the organisation of the courts and the status of judges must be contained in a single organic law aimed at codifying this matter.¹¹⁴ The Constitution thus refers to statutory provisions which are intended to introduce specific solutions in this regard, based on existing constitutional principles.

This shaping and, in a sense, highlighting of the rank of the judiciary, although obviously a more complex problem than within the framework of the (essentially introductory) remarks above, is due, one may think, to the fact that the period of constitutional work prior to 1978 departed from the totalitarian regime, where the first step was to recognise the judiciary as a power on an equal footing with other branches of the state and to guarantee the independence of the courts, to bring the judiciary out of the impotence and insignificance to which the dictatorship had relegated it.¹¹⁵

It must be added in this connection that the Spanish judiciary - in accordance with the provisions of the Spanish Constitution - has, since the 1978 Constitution came into force, known a judicial council (*Consejo General del Poder Judicial*) to which it entrusts certain functions, particularly with regard to appointment, promotion, supervision and disciplinary responsibility (Article 122(2) of the Spanish Constitution). These are the decisions that most directly affect the legal status of judges: access to a judicial career and to any specific position, promotion in rank, examination of the effectiveness of the functioning of judicial bodies and submission, where appropriate, to a procedure of sanctions for non-compliance with professional obligations. The link between what the Constitution necessarily reserves to the council and the protection of judicial independence is therefore obvious.¹¹⁶ Judges are consequently appointed with the participation of the *Consejo General del Poder Judicial*.

One of its tasks is to protect the independence of judges. As pointed out in the doctrine the council is a kind of institution closely related to the Spanish judicial model and therefore can be said to be absolutely essential

¹¹⁴ Luis María Díez-Picazo Giménez, 'Artículo 122' in Pablo Perze Trempts, Alejandro Saiz Arnaiz and Carmen Montesinos Padilla (eds), *Comentario a la Constitución Española. 40 Aniversario. Libro-Homenaje a Luis López Guerra. Tomo II* (Tirant lo Blanch 2018) 1719-1720.

¹¹⁵ Antón (n 38) 641 ff.

¹¹⁶ Díez-Picazo Giménez (n 43) 1725.

in a modern constitutional democracy.¹¹⁷ The constitution defines it as the 'governing body' of the judiciary, although, somewhat puzzlingly in the context of the independence of this council, the vast majority of its members, including judges, are elected by parliament.

Judges - according to Spanish doctrine - benefit from guarantees of irremovability and independence, the purpose of which is, among other things, to protect the regular exercise of their jurisdictional function. The use of artificial intelligence in the administration of justice may be relevant to the perception of legal certainty and fairness, values that appear to be essential in the exercise of justice on behalf of the nation. For these mechanisms to be used in practice, it is therefore necessary for them to be legitimised in society and regulated accordingly.¹¹⁸

The problem of the legitimacy of the judicial power is linked to a claim derived from Article 117(1) of the Spanish Constitution, which emphasises the links between the exercise of justice and the nation. The exercise of judicial authority is carried out on behalf of the Spanish people, and must be based on a series of constitutional principles, which constitute, among other things, the parameter of constitutionality of the operation of the courts, being a limit that the legislature cannot exceed when regulating the exercise of judicial authority. In the exercise of judicial authority, it is necessary in doing so to seek a connection between its exercise and the powers derived from the people. The judicial authority must be characterised by democratic legitimacy.¹¹⁹ This is because it is a power exercised on behalf of the people, and therefore the competences granted to those exercising this power must derive from the will of the people.¹²⁰ One way of maintaining the democratic legitimacy of a judge's actions without the judgement losing the element that is essential in a democratic system (the supremacy of the people)¹²¹ could be, as it is pointed out, to order the determination of the state of public opinion as to what is to be decided, which of course - in the current

¹¹⁷ *ibid* 1723-1724.

¹¹⁸ Paulo Ramón Suárez Xavier, *Gobernanza, inteligencia artificial y justicia predictiva: Los retos de la administración de justicia ante la sociedad en red* (UMA Editorial 2020) 421.

¹¹⁹ Laura Miraut Martín, 'La legitimidad democrática del poder judicial' (2022) 17 *Revista Internacional De Pensamiento Político* 389.

¹²⁰ David David Ortega Gutiérrez, 'Elección del Consejo General del Poder Judicial: un análisis panorámico' (2022) 114 *Revista de Derecho Político* 13, 27 and n.

¹²¹ *Ibid*, 404.

factual and normative state - seems impossible to implement in practice. This does, however, open the way to exploring the possibility of supporting the jurisdictional process with new technologies.

It is worth mentioning at this point that in recent years there has been a dispute in Spain over the manner in which the members of the *Consejo General del Poder Judicial* were elected, even causing a certain deadlock in practice.¹²² These events have intensified the discussion about the status of the judiciary, its legitimacy and origin,¹²³ which also - in the context of the consideration of the administration of justice by artificial intelligence - should be noted. The conclusions flowing from this discussion prescribe a profound respect for constitutional values in the future, guided by the interests of the nation when making possible changes in the area of judicial authority.¹²⁴

Currently, when the Spanish legislator refers to judges, as Spanish scholars point out, it is about human judges. This is supported by the position that only independent and impartial judges are entrusted with the provision of judicial protection.¹²⁵ An algorithmic judge is not supposed to guarantee such values - at least according to the known tools used in practice.¹²⁶ However, the emergence of artificial intelligence in all sectors of daily life in Spain leads to the question of how this would affect the provision of effective judicial protection through adjudicating machines. This highlights that the development of the activity of these systems may not be free from the particular vision or ideology of the people who create the artificial intelligence system. However, this does not exclude the use of this idea in the administration of justice on a broader scale in the future, but it is postulated that various safeguards have to be widely introduced to create a mechanism

¹²² Sergio Martín Guardado, 'Polarización política y crisis en la renovación del Consejo General del Poder Judicial' (2023) 117 *Revista de Derecho Político* 131.

¹²³ Rodrigo Miguel Barrio, 'El Consejo General del Poder Judicial en Perspectiva: análisis, desafíos y propuesta de reforma' (2024) 120 *Revista de Derecho Político* 289.

¹²⁴ Pascual Martín Gallardo, 'El Consejo del Poder Judicial: ¿De la crisis institucional a la reforma?' (2025) 25 *Revista Estudios Jurídicos. Segunda Época* 1.

¹²⁵ Carlos Adolfo and Picado Vargas, 'El derecho a ser juzgado por un juez imparcial' (2014) 2 *Revista de IUDEX* 31.

¹²⁶ Elena Pineros Polo, 'El Juez-Robot y su encaje en la Constitución Española. La inteligencia artificial utilizada en el ámbito de la toma de decisiones por los tribunales' (2024) 72 *Revista de Derecho Público* 53.

to legitimise artificial intelligence.¹²⁷ However, it is currently considered that the idea of an algorithmic judge, in the context of solutions known to current legal practice, conflicts in Spain with the constitutional principles that define the judicial function. The Spanish Constitution constituted the jurisdiction as a human judicial system, designed for the people and managed by the people. However, this does not lead the individual discussants to reject the use of artificial intelligence for judicial decision-making. Rather, the discussion points to the need for further research and the search for an optimal solution, which can be very attractive. The prevailing view in Spanish academia - as may be evaluated - is that jurisdictional activity cannot be replaced in the current constitutional configuration by any automation process, as this would jeopardise the principle of jurisdictional exclusivity, as provided for in Article 117(4) of the Spanish Constitution. Thus, if the automation (robotisation) of the administration of justice were to take place in the future, legislative changes would be necessary.¹²⁸

It should be noted that from the point of view of the Spanish legal system, the eventual use of artificial intelligence applied to judicial decisions is directly related to the fundamental rights recognised by Article 24 of the Spanish Constitution, in the sense of the guarantee of effective judicial protection, prohibition of defencelessness, ordinary judge predetermined by law, and public proceedings with all the guarantees. This is also an area that needs to be noticed.¹²⁹ The right to effective judicial protection, recognised by the Spanish Constitution within the framework of fundamental rights and public freedoms, cannot be understood as detached from the reality in which it operates, like the other rights.¹³⁰

Despite the doubts indicated regarding the legal position of a judge, it must be pointed out that Spanish law is aware of certain elements of

¹²⁷ Elena Pineros Polo, 'El Juez-Robot y su encaje en la Constitución Española. La inteligencia artificial utilizada en el ámbito de la toma de decisiones por los tribunales' (2024) 72 *Revista de Derecho Público* 53, 66 ff.

¹²⁸ Suárez Xavier (n 47) 389 ff.

¹²⁹ Cristina Lorenzo Pérez, *Inteligencia Artificial en la Administración de Justicia: Regulación española y marco europeo e internacional. Proyectos desarrollados por el Ministerio de Justicia de España*. (Ministerio de Justicia 2022) 5 ff.

¹³⁰ Francesc Pérez Tortosa, 'Justicia digital y tutela judicial efectiva en la proyectada normativa de eficiencia procesal y de eficiencia digital en España' (2024) 39 *Temas Procesales* 31.

automation in judicial procedures.¹³¹ It is impossible to list them all. However, one can mention, for example, the conduct of electronic auctions or the automatic issuing of a receipt by the Electronic Judicial Register, actions permitted under the provisions of the law of 5 July 2011, *Ley 18/2011*, regulating the use of information and communication technologies in the administration of justice.¹³² This could be a paradigm for further exploration in this area, including the use of artificial intelligence.¹³³ Indeed, one of the elements of the *España Digital 2025* programme being implemented in Spain is a digital transformation effort also in the area of judiciary, which, in a way, forces further exploration of this space.¹³⁴

Thus, Spanish law, analysed at an appropriate level of generality, seems to provide interesting arguments for the discussion of algorithmic judges, although the outlook on some leading aspects of this area differs somewhat from the German approach. However, both systems are looking to the more distant future, which may well be algorithmic.

At this point it is worth noting also the example of Polish law, which has the longest constitutional traditions among the discussed countries, and which regulates the issues of the judiciary and judicial authority somewhat differently from the two paradigms mentioned above. The Polish Constitution (*Konstytucja Rzeczypospolitej Polskiej*) of 2 April 1997, which is in force in this respect, is the most contemporary of the basic laws discussed here in detail, although the systemic practice of its application is almost 30 years old.

According to the provisions of the Polish Constitution, the Republic of Poland is the common good of all citizens (Article 1), a democratic state governed by the rule of law, implementing the principles of social justice (Article 2), in which supreme authority belongs to the nation (Article

¹³¹ Marta Cabrera Fernández, 'Aplicación de la Inteligencia Artificial a la toma de decisiones judiciales' (2024) 27 EUNOMÍA. Revista En Cultura De La Legalidad 183.

¹³² *Ley 18/2011, de 5 de julio, reguladora del uso de las tecnologías de la información y la comunicación en la Administración de Justicia*, BOE-A-2011-11605.

¹³³ As indicated in the explanatory memorandum of Royal Decree 6/2023, of 20 December 2023, on the transformation of, among other things, the judiciary: *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*, BOE-A-2023-25758.

¹³⁴ Lorenzo Pérez (n 53) 23 ff.

4(1) of the Polish Constitution). At the same time, the Constitution is the supreme law of the Republic of Poland (Article 8(1)) and the Republic of Poland observes international law binding upon it (Article 9). The system of government of the Republic of Poland is based on the division and balance of the legislative power, the executive power and the judicial power (Article 10(1)). The latter is exercised by the courts and tribunals (Article 10(2) of the Polish Constitution *in fine*).¹³⁵

In Polish law, courts and tribunals are a separate and independent authority from other authorities (Article 173 of the Polish Constitution). This principle of independence and separateness of courts and tribunals from other state authorities is realised in several aspects.¹³⁶ As indicated in the Polish doctrine, firstly, it is about the organisational separation of courts and tribunals from the organs of other authorities. Secondly, the legislator granted sovereignty to the court to decide whether a case submitted to it falls within its competence. Thirdly, it is a matter of ensuring, by law, that the judicial self-government is adequately involved in the appointment of the persons in charge of the work of a given court (chief judges). Fourthly, there is a prohibition on other authorities depriving a citizen's access to courts. Fifthly, it is necessary to provide the financial means to enable the permanent functioning of the courts and tribunals and to ensure the remuneration of judges. Sixthly, it is possible to allow interference by other authorities only in the non-judicial sphere of court activities. Interference in the activities and organisation of the judiciary may take place only in cases specified by law. Seventhly, it is about ensuring guarantees of procedural nature, such as openness of court proceedings, secrecy of judicial deliberations, collegiality of adjudication, free assessment of evidence, or the institution of exclusion of a judge from participation in a particular case. Eighth and finally, it is about ensuring guarantees concerning the position of the judge, including his or her independence, irremovability or immunity protection.¹³⁷

The administration of justice in Poland is exercised by the Supreme Court, common courts, administrative courts and military courts (Article

¹³⁵ Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* (Wolters Kluwer 2024) 369 ff.

¹³⁶ Maciej Jakub Zieliński, *Niezależność władzy sądowniczej a model stosunku służbowego sędziego* (Wolters Kluwer 2024) 127 ff.

¹³⁷ Bogusław Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (CH Beck 2012) *passim*.

175 of the Polish Constitution).¹³⁸ In this respect, the Constitution does not entrust any competences to the Constitutional Tribunal, whose tasks are of a different nature. The Polish Constitution also provides for the existence of the council of the judiciary (*Krajowa Rada Sądownictwa*), a body intended to guard the independence of the courts and the independence of judges (Article 186(1) of the Polish Constitution),¹³⁹ whose proposal is necessary for the appointment of a judge, which is made in Poland each time by the President of the Republic of Poland (Article 179 of the Polish Constitution).¹⁴⁰ Judges are therefore in Polish law appointed at the request of the *Krajowa Rada Sądownictwa*. There is currently a significant controversy around this council, due to a change in the way the judicial part of this council is selected. As of 2018, there is an ongoing dispute in Poland as to whether the reliance of the Polish legislator on the Spanish model, where the judicial members of the council are elected by the parliament, should be acceptable, in the context of the council's performance of its constitutional functions.¹⁴¹ This controversy now has important international implications.

According to Article 178(3) of the Polish Constitution, a judge may not belong to a political party, a trade union or engage in public activities incompatible with the principles of the independence of courts and the independence of judges. The introduction of the above-mentioned prohibitions of political activity and restrictions on public activity stem from the need to ensure the separation of the judiciary from the legislature and *vice versa*. There is a strong current in Polish constitutional law doctrine according to which a judge should not betray his or her political convictions, take an active part in a political debate, engage in an election campaign on the side of a certain group, express opinions on the implementation of competences by any public authority or declare publicly his or her affiliation to a particular religion or church.¹⁴² All of this is to ensure the implementation of judicial

¹³⁸ Stępień-Załucka, *Sprawowanie wymiaru sprawiedliwości przez Sąd Najwyższy w Polsce* (n 59).

¹³⁹ Sławomir Patryra, 'Krajowa Rada Sądownictwa w Polsce' [2019] *Przegląd Prawa i Administracji* 123.

¹⁴⁰ Patryk Bialic, 'Charakter prawny postanowienia Prezydenta RP o powołaniu do pełnienia urzędu sędziego' (2024) 2 *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 67.

¹⁴¹ Adam Roch, 'Konstytucyjna problematyka wyboru sędziów do Krajowej Rady Sądownictwa' (2021) 7-8 *Prokuratura i Prawo* 162.

¹⁴² Wojciech Molski, 'Kilka uwag na temat konstytucyjnej regulacji apolityczności sędziów w Polsce' (2019) 9 *Prawo i Polityka* 23.

independence and to prevent judges from engaging in activities that could be perceived as negatively affecting their independence.

Against the backdrop of the above constitutional provisions, the jurisprudence of the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*), according to the Polish Constitution the only organ authorised to examine the constitutionality of law (Article 188 of the Polish Constitution), is interesting and of great significance for further considerations concerning the search for a common European judicial standard. This is because the Polish Constitutional Tribunal in its extensive jurisprudence has attempted to develop a standard which concretises the provisions of the Constitution with regard to the constitutional position of courts and tribunals, and indirectly also of judges, taking a European perspective.

In its jurisprudence to date, the Polish Constitutional Tribunal has emphasised a number of attributes of judicial power.¹⁴³ For example, in the judgment K 34/15, the Tribunal emphasised that the principle of separation of powers (Article 10(1) of the Polish Constitution) and Article 173 of the Polish Constitution, stipulating that courts and tribunals are a separate and independent authority from other authorities, result in the separation of the judiciary from the others. In turn, the Tribunal pointed out that in this way the systemic separation of the judiciary power, related to its specific competences and the manner in which its organs are situated, also fully applies to the Constitutional Tribunal. It thus determines the direction of any assessments made with respect to the statutory regulations specifying the manner of organisation of the Tribunal and the conditions for performance of its systemic tasks.¹⁴⁴

In another judgement, the Tribunal indicated that the separation of the organs of judicial authority from other authorities is intended to ensure that the courts and tribunals are fully independent in their examination of cases and adjudication. With regard to the Tribunal, it is about enabling the independent and autonomous performance of its constitutionally defined functions. This is of particular importance given that the Tribunal is the only organ of the judiciary empowered to adjudicate on the compliance of laws and ratified international agreements with the Constitution, on the

¹⁴³ Paweł Nowotko, 'Pojęcie legitymizacji na przykładzie statusu sędziego w polskim prawie konstytucyjnym' (2023) 73 *Przegląd Prawa Konstytucyjnego* 25.

¹⁴⁴ *Trybunał Konstytucyjny*: 9 December 2015, K 35/15 (2015) OTK-A 11. Similarly: *Trybunał Konstytucyjny*: 3 December 2015, K 34/15 (2015) OTK-A 11.

constitutionality of the aims or activities of political parties, on the resolution of disputes between central, constitutional organs of the state and on the temporary impediment to the exercise of office by the President (Articles 131(1), 188 and 189 of the Polish Constitution). In this way, the independence of the Tribunal, which creates conditions for the independent exercise of the review of constitutionality, becomes at the same time a principle that serves directly to protect the Constitution itself.¹⁴⁵

In doing so, the Tribunal emphasised that its principle of independence (Article 173 of the Polish Constitution) is closely linked to the principle of independence of Tribunal judges (Article 195(1) of the Polish Constitution). These principles exclude all forms of influence on the jurisprudence of the Tribunal by other organs of public power.¹⁴⁶ The legislative and executive powers may therefore not interfere in those areas in which judges are independent.¹⁴⁷ In particular, the legislature may not encroach on the 'competence core' of the judiciary in the form of adjudication. The mechanism of checks and balances, which presupposes the possibility of interference in the scope of the judicial power, cannot touch the independence of judges in the exercise of their office.¹⁴⁸

The theses of the Constitutional Tribunal's rulings have recently resonated more than once in the jurisprudence of common and administrative courts, and in particular have appeared in the jurisprudence of the Supreme Court of Poland (*Sąd Najwyższy*) and the Supreme Administrative Court of Poland (*Naczelny Sąd Administracyjny*), the two highest judicial instances in Poland. The legal status of judges has recently been discussed in Polish jurisprudence, which is related, inter alia, to the dispute over the shape of the Polish judiciary, which, after a period of internal discussion, has acquired an international character, involving the bodies of the European Union and the Council of Europe. This discussion, which is yet to be presented, is in principle not over. What is symptomatic in it, however, is that the individual parties refer to a European standard, often derived from observations of the functioning of the judiciary of other European countries, especially

¹⁴⁵ *ibid.*

¹⁴⁶ *Trybunał Konstytucyjny*: 14 April 1999, K 8/99 (1999) OTK 3.

¹⁴⁷ *Trybunał Konstytucyjny*: 19 July 2005, K 28/04 (2004) OTK-A 7; *Trybunał Konstytucyjny*: 29 November 2005, P 16/04 (2004) OTK-A 10.

¹⁴⁸ *Trybunał Konstytucyjny*: 18 February 2004, K 12/03 (2004) OTK-A 2.

Spain and Germany, which also seems to justify the need to look at the legal regulations of these countries from a comparative perspective.¹⁴⁹

It is worth adding at this point that in the course of constitutional work in Poland, reference was made, inter alia, to the necessity of ensuring systemic guarantees of the independence and impartiality of a judge and the independence of a court, deriving these elements of the right to a fair trial precisely from the jurisprudence of the Constitutional Tribunal (established in Poland in 1982, although its jurisprudential activity did not begin until 1986), which outlined them still at the turn of the political transformation period.¹⁵⁰ This is because it should be noted that the understanding of the constitutional right to a fair trial did not really function in Poland before 1989, and when starting the political changes after the communist period Poland had significant delays in this respect.¹⁵¹ However, from the very beginning of the political transformation, there was a widespread conviction that 'the right to a fair trial' (then referred to in Poland primarily as 'the right to a court') should be constitutionalised and its guarantees established. However, it is only on the basis of the current Constitution that the basic elements of the right to a fair trial, the guarantees of the realisation of this right and the manner in which the right to a fair trial should be concretised in legislation and in the activities of the courts themselves have been clearly distinguished.¹⁵²

Moreover, an extremely interesting area, which has been widely discussed in Poland recently, is the area of the origin of judicial authority, including its democratic legitimacy.¹⁵³ The stimulus for this discussion was the current manner of electing members of the *Krajowa Rada Sądownictwa* and the possible link between judges and the concept of the exercise of judicial power on behalf of the nation. This is because so far, as one may

¹⁴⁹ Haczkowska (n 42) 422 ff.

¹⁵⁰ *Trybunał Konstytucyjny: 12 April 1999, Uw 9/88* (1989) OTK 1.

¹⁵¹ Piotr Tuleja, 'Kształtowanie się prawa do sądu w Polsce' in Grodziski Stanisław and others (eds), *Vetera novis augere: studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi* (Wydawnictwo Uniwersytetu Jagiellońskiego 2010) 1046.

¹⁵² Monika Florczak-Wątor, 'Prawo do sądu jako prawo jednostki i jako gwarancja horyzontalnego działania praw i wolności' (2016) 3 *Przegląd Prawa Konstytucyjnego* 47.

¹⁵³ Ryszard Piotrowski, 'Sędziowie i granice władzy demokratycznej w świetle Konstytucji RP' (2018) 80 *Ruch Prawniczy Ekonomiczny i Socjologiczny* 215.

think, the legitimacy of the judiciary was rather derived from its authority, which was not and still is not precisely reflected in the Polish Constitution.¹⁵⁴

It follows (at least indirectly) from such a constitutional state of affairs that if the Polish constitution speaks of judges it means people. Polish law is silent on the possibility of someone other than a human being exercising judicial power.¹⁵⁵ Therefore, it is rather commonly indicated that this is a competency in Poland constitutionally reserved for the people. It is now humans, as impartial and independent judges, who can exercise the administration of justice. The doctrine in this regard points to the need to ensure numerous constitutional standards in case of future changes. Therefore, it does not exclude this possibility but only argues that in order to transform the judiciary, which is most likely desirable in view of its inefficiency, it is necessary to see constitutional guarantees for the exercise of judicial power.¹⁵⁶

According to the Polish Constitution, it is Polish citizens enjoying full public rights who have the right of access to the public service (Article 60 of the Polish Constitution). Public service, in turn, is understood to mean all positions in the organs of public authority, and therefore also positions in the judiciary. It is a political right, seen as the equivalent of the right of citizens to participate in the exercise of public authority. A possible metamorphosis of the judiciary must also take this aspect into account, although the exercise of the right of access to the public service may, according to the Polish Constitution, be restricted by law if this is necessary in a democratic state for the protection of public safety and order, the protection of the environment, public health and morals, and the rights and freedoms of others. At the same time, such limitations may not violate the essence of this right (Article 31(3) of the Polish Constitution).¹⁵⁷

¹⁵⁴ Anna Krzynówek-Arndt, 'Granice władzy w demokracji konstytucyjnej' (2023) 14 *Horyzonty Polityk* 5.

¹⁵⁵ Beata Stępień-Załużka, 'LegalTech 3.0. Some Reflections on the Constitutional Prerequisites for the Use of Artificial Intelligence in the Administration of Justice' (2025) 73 *Europejski Przegląd Prawa i Stosunków Międzynarodowych* 145.

¹⁵⁶ Tomasz Szanciło and Beata Stępień-Załużka, 'Sędzia robotem a robot sędzią w postępowaniu cywilnym w ujęciu konstytucyjnym i procesowym' (2023) 47 *Prawo i Wiąż* 217.

¹⁵⁷ Anna Michalak, 'Dostęp do służby publicznej w świetle postanowień Konstytucji RP - wybrane zagadnienia' (2014) 21 *Przegląd* 145.

Therefore, as can be seen in practice, also in Polish law the most essential features of modern judiciary are subject to constitutionalisation.¹⁵⁸ At times, the approach of the Polish legislator differs from that of other countries, which further increases the necessity to consider both the deviation from some European standard and doubts as to whether such a standard can be created at all. Despite similar standards, traditions or characteristics of national law may be slightly different.

In turn, the considerations carried out show that the drafters of the various constitutions were rather guided by traditional concepts and foundations of the functioning of the state in the context of the administration of justice. This may not come as a surprise, after all, e.g. algorithmic solutions could not have been taken into account during the constitutional work, because even though artificial intelligence was already an area noticed in some states at that time, it was rather *terra incognita* and certainly did not pretend to function in the administration of justice. The first such solutions did not appear until the 21st century. This is certainly one of the reasons why there are currently no provisions of constitutional rank in European countries that explicitly define the area of use of artificial intelligence in the administration of justice.

1.3. Dialogue between national and European authorities in the field of judiciary as justification for comparative research

In European jurisprudence (the Court of Justice of the EU, but also the European Court of Human Rights), a trend has emerged in recent years with which national constitutional law, at least in some aspects, clashes, due to the fact that numerous European legal acts have a wide scope and often replace national law in important areas of life. The reason for the strong influence of supranational legal acts on national law and the associated case law is first and foremost the transfer of sovereign rights by the Member States to the European Union, with the aim of establishing common, uniform and applicable law throughout Europe in areas previously reserved exclusively for national law. By this 'transfer of sovereign rights' there is - in the words of the German Federal Constitutional Court, for example - an 'opening up' of the national legal system,¹⁵⁹ which means that supranational law of the

¹⁵⁸ Jarosław Szymanek, 'Podział władz: idea i jej konstytucjonalizacja' (2023) 1 Przegląd Legislacyjny 11.

¹⁵⁹ Rainer Arnold, 'The case law of the German Federal Constitutional Court and the process of European integration' (1999) 1 European Studies 95, 95 ff.

European Union takes precedence in principle over the often contradictory national law.

The issue of the relationship between national law and EU law, particularly in the context of the primacy of one over the other, seems to generate controversy from time to time. This is particularly the case when the subject of assessment is a norm of national constitutional law which has a content contrary to EU law.¹⁶⁰ In joining the EU, individual countries entrusted certain competences to the EU, probably only theoretically thinking about such possibilities. In the meantime, however, the practice of applying EU law is - over the years - different, increasingly raising doubts about the primacy of national constitutions over EU law and *vice versa*.¹⁶¹ This is particularly evident in the new EU countries with a significant constitutional tradition, where over the years there has been no doubt that the constitution is the supreme law of the country. However, the EU is increasingly extending its competences and some EU bodies consider EU law to be superior to national constitutions as well, which is received rather surprisingly by some member states.¹⁶²

A peculiar position in this regard has long been taken by the Court of Justice of the EU, which has already repeatedly expressed the view that EU law prevails over national law.¹⁶³ This follows, of course, from the principle of the primacy of EU law over national law and the principle of effectiveness of EU law, which imply, *inter alia*, the impossibility of introducing provisions of national law which would be in conflict with EU law and the necessity of the application of the latter, in any case of conflict, by all state authorities. This is to apply to all types of normative acts in the internal legal order,

¹⁶⁰ Haczkowska (n 42) 423 ff.

¹⁶¹ Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 75 ff.

¹⁶² SG Barbu and CM Florescu, 'The Independences of Judges at the Confluence between the Primacy of the National Constitutional Law and the Primacy of the European Union Law' (2023) 15 Bulletin of the Transilvania University of Braşov. Series VII: Social Sciences • Law 259.

¹⁶³ Monica Claes, 'The Validity and Primacy of EU Law and the "Cooperative Relationship" between National Constitutional Courts and the Court of Justice of the European Union' (2016) 23 Maastricht Journal of European and Comparative Law 151.

including acts of constitutional rank.¹⁶⁴ However, the CJEU's view is not shared by national constitutional courts, which is slowly leading to a wide-ranging debate on the problem.¹⁶⁵ One aspect of this debate is the issue of the judiciary, particularly in its national dimension, including the sources of judicial authority. This area is worth looking into, if only because it shows a different approach to certain standards of administration of justice, which in the case of progressive solutions such as artificial intelligence may also be important in the future.

It should be recalled that the second subparagraph of Article 19(1) TEU imposes an obligation on all Member States to put in place the remedies necessary to ensure effective legal protection in the areas covered by European Union law,¹⁶⁶ and Article 47 of the Charter of Fundamental Rights reaffirms the right to an effective remedy and to a fair trial before an independent court where a breach of rights and freedoms guaranteed by Union law is alleged.¹⁶⁷ It should be added that Article 4(2) TEU imposes an obligation on the EU to respect the national identities of the Member States, which are 'inextricably linked to their fundamental political and constitutional structures'.¹⁶⁸ This regulation must be read in conjunction with the principle of conferred powers in Article 5 TEU, which lists the competences of the European Union. The TEU specifies the principle of conferral (principle of conferred powers), in Article 5: 'In accordance with the principle of conferral, the Union shall act only within the limits of the competences conferred on it by the Member States in the Treaties for the achievement of the objectives set out therein' (Article 5(2) 1st sentence TEU). Article 5(2) 2nd sentence TEU

¹⁶⁴ Davide Paris, 'Constitutional Courts as European Union Courts: The Current and Potential Use of EU Law as a Yardstick for Constitutional Review' (2018) 24 *Maastricht Journal of European and Comparative Law* 792.

¹⁶⁵ Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) 15 ff.

¹⁶⁶ Vetle Magne Seierstad, 'The Obligation to Establish and Uphold Judicial Independence under Article 19(1) TEU' (2024) 1 *Nordic Journal of European Law* 23.

¹⁶⁷ Giulia Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in Chantal Mak and Betül Kas (eds), *Civil Courts and the European Polity: The constitutional role of private law adjudication in Europe* (Hart Publishing 2022) 141-160.

¹⁶⁸ Gerhard van der Schyff, 'The Constitutional Relationship between the European Union and Its Member States: The Role of National Identity in Article 4(2) TEU' (2012) 5 *European Law Review* 563.

makes it clear that competences not conferred on the Union in the Treaties remain with the Member States. The principle of conferral sets the limits of the European Union's competences, and the Member States are free to act to the extent that an area has not been delegated to the European Union.¹⁶⁹

Against such a background, it is undoubtedly the case that the organisation of national judiciary is not one of the competences conferred on the EU by the Member States¹⁷⁰ (it is not listed in the competences conferred on the EU in Articles 2, 3, 4 and 6 TFEU) and therefore - at least in principle - should be the responsibility of the Member States. Member States have also retained the exclusive right to shape the procedures and to designate the bodies responsible for enforcing the rights granted to individuals by EU substantive rules. However, this autonomy of the Member States, which can be described as procedural autonomy, should be interpreted in the light of the principle of the effectiveness of EU law, which implies the obligation of the Member State to provide an effective judicial remedy in any case where there is a connection with EU law.¹⁷¹ This is where some discrepancies arise, mainly related to the concept of ensuring the effectiveness of EU law as represented by the Court of Justice of the EU, which often differs from the concept of national constitutional courts.

The European Court of Human Rights, as is well known not to be an EU body, also adds its 'three cents' in this area, especially that the EU countries are also members of the Council of Europe. From this membership stems the obligation to respect the European Convention on Human Rights. In turn, the Convention is not only an inventory of protected human rights, but also an act that provides for complaint procedures to ensure that the actions and omissions of a state party are challenged before an international adjudicatory institution, the European Court of Human Rights. Every state party to the European Convention on Human Rights must accept a full

¹⁶⁹ Antonio Goucha Soares, 'The Principle of Conferred Powers and the Division of Powers Between the European Community and the Member States' (2001) 23 *Liverpool Law Review* 57.

¹⁷⁰ Serena Menzione, 'The Organization of the National Judiciary: A Competence of the Member States within the Scope of EU Law' (2020) 19 *l'Annuaire de droit de l'Union européenne* 361, *passim*.

¹⁷¹ Petra Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2022) 27 *European Law Journal* 185.

complaints mechanism, i.e. the possibility of bringing both inter-state and individual complaints against it.¹⁷²

There is no *prima facie* standard from the European Convention on Human Rights relating to the organisation of judiciary.¹⁷³ The only provision of the Convention that may be applicable in this regard is the very general provision of Article 6(1) ECHR, which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law when deciding on his civil rights and obligations or on the merits of any criminal charge brought against him.¹⁷⁴

The jurisprudence of both European tribunals, i.e. the Court of Justice of the EU as well as of the European Court of Human Rights (which are in a kind of dialogue with each other)¹⁷⁵ has over the years led to attempts to develop a European standard of an independent court, which at first sight seems to be a kind of extension of national constitutional law thought, where the independence of courts with impartial and independent judges is generally referred to.¹⁷⁶ In particular recently, the aforementioned judicial standard has been developed by the aforementioned case law, reflecting, inter alia, on the origin of judicial authority and the way judges are appointed to office in the Member States in the context of their impartiality and independence, which may be at least indirectly relevant to the issues of the use of artificial intelligence in the administration of justice.¹⁷⁷

However, it should be noted that it was the aforementioned case law that led to a dispute with national authorities, in particular because in its

¹⁷² Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 Human Rights Law Review 655.

¹⁷³ Robert Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' (2021) 27 European Law Review 211.

¹⁷⁴ Aleksandra Nowosad, 'Article 6 of the European Convention on Human Rights (Right to a Fair Trial) in Juvenile Cases' (2024) 59 Journal of Modern Science 174.

¹⁷⁵ Amalie Frese and Henrik Palmer Olsen, 'Spelling It Out – Convergence and Divergence in the Judicial Dialogue between Cjeu and ECtHR' (2019) 88 Nordic Journal of International Law 429.

¹⁷⁶ Anja Seibert-Fohr, 'European Standards for the Rule of Law and Independent Courts' (2012) 20 Journal für Rechtspolitik 161.

¹⁷⁷ Doris Wydra, 'Contested Procedures: The Challenge of Enforcing European Standards of Judicial Independence in EU Accession Countries' (2024) 70 OER Osteuropa Recht.

light it turned out that the procedure for appointing judges in a given country is also covered by the right to a fair trial under European regulations, and a group of judges may not meet the standards necessary for the creation of an independent court before taking office and assuming judicial functions. Even though, as is well known, these problems currently concern the appointment of judges in Member States, the conclusions of this discussion may be important for the future use of artificial intelligence in the judicial system. Indeed, it seems that the time when the problems of artificial intelligence in the judiciary will become the subject of interest of the European tribunals and constitutional courts of the Member States is not as far away as it sometimes seems. Differences may arise between individual European states not only as to whether or not to use artificial intelligence in the administration of justice, but also, for example, what the scope of such use may be, or how to 'relieve' traditional judges, which may give rise to significant controversies, for example, as to whether the EU standard of the right to a fair trial is met. This is already evident, *inter alia*, in some non-European countries, particularly in some American countries, where the first statements of constitutional courts regarding standards for the administration of justice using artificial intelligence have already appeared. The current activities of the European tribunals are therefore worth watching. Perhaps these tribunals will set the tone for the discussion on the use of artificial intelligence in the judiciary in the future.¹⁷⁸

It may be recalled that this activity of the European tribunals in the aspect of the source of judicial power and the origin of judges has been, in this respect, recently inspired - as one may think - by the reform concerning the organisation of the judiciary in Poland. The background is the legislative changes that took place in Poland in December 2017, which concerned the way in which the composition of the council of the judiciary (*Krajowa Rada Sądownicza*) was formulated from the beginning of 2018 (Act of 8 December 2017).¹⁷⁹ As a result of these changes, a new way of electing the judicial members of this council was introduced (election - following the Spanish

¹⁷⁸ Paul Nemitz, 'Constitutional Democracy and Technology in the Age of Artificial Intelligence' (2018) 376 *Philosophical Transactions* 1; Cédric Aguzzi, 'Le juge et l'intelligence artificielle: la perspective d' une justice rendue par la machine' (2020) 35 *Annuaire international de justice constitutionnelle* 621.

¹⁷⁹ *Ustawa z 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*, *Dziennik Ustaw* 2018, item 3.

model - by the parliament instead of the previous election by judges).¹⁸⁰ According to the recently emerging jurisprudence of the European tribunals, such composition of the *Krajowa Rada Sądownictwa* has been flawed in Poland since 2018.¹⁸¹ The case is interesting because about one third of all judges in Poland were appointed with the participation of the *Krajowa Rada Sądownictwa* shaped in this way.¹⁸²

In its assessment of this reform, the European Court of Human Rights was the first to issue a ruling on complaints regarding violations of the Strasbourg standards. From May 2021, when the first judgment on the reform of the judiciary in Poland was issued, until the end of 2023, the Court issued eleven judgments on various aspects of this reform, in which it found a violation of Article 6(1) ECHR on various grounds.¹⁸³

¹⁸⁰ Cf., e.g. Krzysztof Grajewski, 'Krajowa Rada Sądownictwa w świetle przepisów ustawy z 8 grudnia 2017 r. - zagadnienia podstawowe' (2018) 38 *Krajowa Rada Sądownictwa* 17; Jędrzej M. Kondek, 'Najwyższa Rada Władzy Sądowniczej w Hiszpanii. Skład i ewolucja historyczna' (2018) 3-4 *Krajowa Rada Sądownictwa* 16; Krzysztof Skotnicki, 'Problem konstytucyjności składu obecnej Krajowej Rady Sądownictwa w Polsce' (2020) 93 *Acta Universitatis Lodziensis. Folia Iuridica* 47; Roch (n 141).

¹⁸¹ Ewa Zelazna, 'Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sądownictwa and CP, DO v. Sąd Najwyższy' (2019) 4 *European Papers* 907.

¹⁸² Wojciech Piątek, 'Restoring the Rule of Law in Poland: Towards the Most Appropriate Way to Put an End to the Systemic Violation of Judicial Independence' (2025) *European Constitutional Law Review* First View 1.

¹⁸³ In the judgment of 7 May 2021, *Xero Flor v. Poland*, ECtHR found a violation of the right to a court established by law due to the participation in the proceedings before the Constitutional Court of a judge whose election was affected by serious irregularities violating the essence of this right. In the judgment of 29 June 2021, *Broda and Bojara v. Poland*, the violation allegedly consisted in the lack of access to court to challenge the decision of the Minister of Justice to prematurely terminate the term of office of the president and vice-president of the court. In the judgment of 22 July 2021, *Reczkowicz v. Poland*, the functioning of one of the chambers of the Supreme Court (the Disciplinary Chamber) was challenged because of the way it was staffed by judges appointed with the participation of the reformed *Krajowa Rada Sądownictwa*. In the judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, a similar view was expressed with regard to another of the chambers of the Supreme Court, the Extraordinary Control and Public Affairs Chamber. In the judgment of 3 February 2022 *Advance Pharma v. Poland*, a violation was derived from the fact that the judges of the Civil Chamber of the Supreme Court appointed on the recommendation of the reformed *Krajowa Rada Sądownictwa* lacked the characteristics of an 'independent and impartial court established by law'. In the judgment of 15 March 2022, *Grzęda v. Poland*, a violation was derived from the lack

In the rulings of the ECtHR, in addition to the various aspects of the reform of the judiciary in Poland that have been recognised by the Court and sometimes challenged, the Court also considered as an integral part of its findings that the violation of the applicants' rights had its origin in the amendments to Polish legislation that deprived the Polish judiciary (judges) of the right to elect judges-members of the *Krajowa Rada Sądownictwa*. According to the Court, this was intended to allow the executive and legislative authorities (and therefore the political power) to interfere directly or indirectly in the procedure for the appointment of judges, thereby systematically undermining the legitimacy of a court composed of judges so appointed. ECtHR therefore interpreted the provisions of the Polish Constitution and the Act regulating the *Krajowa Rada Sądownictwa*, emphasising that the current system of shaping the composition of the council breaches the existing European standard whereby only judges should be elected as members of the body participating in the procedure for selecting

of access to court to challenge the premature termination of the term of office of a member of the old *Krajowa Rada Sądownictwa*. A similar violation was found in the judgment of 16 June 2022, *Żurek v. Poland*. In the case of *Juszczyszyn v. Poland*, the judgment of 6 October 2022 again challenged the functioning of one of the Chambers of the Supreme Court (the Disciplinary Chamber) on the grounds that it was staffed by judges appointed with the participation of the reformed *Krajowa Rada Sądownictwa*. A violation of the same standard was found in the judgment of 6 July 2023, *Tuleya v. Poland*. Meanwhile, in the case of *Pająk v. Poland*, the judgment of 24 October 2023 found a violation related to the lack of access to court to challenge the decisions of the Minister of Justice refusing the applicants to continue to serve as judges beyond the reduced retirement age. In turn, the *Wałęsa v. Poland* judgment challenged the mechanism of the extraordinary complaint, an extraordinary remedy available against final judgments and introduced into Polish law as part of the reform of the judiciary, as well as, the appointment of judges to one of the chambers of the Supreme Court (the Extraordinary Control and Public Affairs Chamber), finding that the judges of this chamber were appointed in violation of the law. Cf. *European Court of Human Rights*: 7 May 2021, *Xero Flor v. Poland*, App. No. 4907/18; *European Court of Human Rights*: 29 June 2021, *Broda and Bojara v. Poland*, App. No. 26691/18 and 27367/18; *European Court of Human Rights*: 22 July 2021, *Reczkowicz v. Poland*, App. No. 43477/19; *European Court of Human Rights*: 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, App. No. 49868/19 and 57511/19; *European Court of Human Rights*: 3 February 2022, *Advance Pharma v. Poland*, App. No. 1469/20; *European Court of Human Rights*: 15 March 2022, *Grzęda v. Poland*, App. No. 43572/18; *European Court of Human Rights*: 16 June 2022, *Żurek v. Poland*, App. No. 39650/18; *European Court of Human Rights*: 6 October 2022, *Juszczyszyn v. Poland*, App. No. 35599/20; *Tuleja* (n 151); *European Court of Human Rights*: 24 October 2023, *Pająk v. Poland*, App. No. 25226/18; *European Court of Human Rights*: 23 November 2023, *Wałęsa v. Poland*, App. No. 50849/21.

candidates for the office of judge. It adopts the construction that judges appointed in a specific manner under national law do not fulfil *in gremio* the standard of an independent and autonomous court established by law within the meaning of Article 6(1) ECHR. The current procedure for the appointment of judges in Poland, essentially to all courts, is therefore flawed according to the ECtHR. As one may think, according to the Court, only the election of judges-members of the *Krajowa Rada Sądownictwa* by other judges would comply with the European standard under Article 6(1) ECHR.

Similar conclusions arise from reading the case law of the Court of Justice of the European Union.¹⁸⁴ For example, in its judgment of 15 July 2021 (C-791/19),¹⁸⁵ the CJEU took the view that only a judicial council whose members do not come from an election made by parliament, but are elected by the judges themselves, provides guarantees of the independence of the judges it appoints. Interestingly, CJEU did not illustrate its concerns with any specific action of the current *Krajowa Rada Sądownictwa* in Poland or the behaviour of its members, assuming, as it were, *a priori* that the legislative changes introduced in Poland were flawed. Similar conclusions also follow from other CJEU rulings.¹⁸⁶

Against such a background, it is necessary to emphasise the position of the Polish Constitutional Tribunal, according to the Polish Constitution the only body authorised to examine the constitutionality of national law, which found the change in the law regarding the manner of appointing members of the *Krajowa Rada Sądownictwa* in Poland to be in compliance with the Polish Constitution.¹⁸⁷ In a judgment of 25 March 2019 (and therefore made before the aforementioned case law of the ECtHR and CJEU),

¹⁸⁴ Beáta Bakó, 'Judges Sitting on the Warsaw-Budapest Express Train: The Independence of Polish and Hungarian Judges Before the CJEU' (2020) 26 European Public Law 587.

¹⁸⁵ *Court of Justice of the European Union: 15 July 2021, C-791/19, ECLI:EU:C:2021:596.*

¹⁸⁶ *Court of Justice of the European Union: 21 December 2023, C-718/21, ECLI:EU:C:2023:1015; Court of Justice of the European Union: 13 July 2023, C-615/20 and C-671/20, ECLI:EU:C:2023:562.*

¹⁸⁷ Although there have also been contrary voices in the Polish legal sciences to this extent. Cf. Jarosław Majewski, 'Strukturalne uzależnienie obecnej Krajowej Rady Sądownictwa od władzy politycznej i wynikająca z tego wadliwość procedury powołań na urząd sędziego a wymóg niezależności i bezstronności sądu oraz instytucja wyłączenia iudex suspectus w postępowaniu karnym' in Paweł Wiliński and Robert Zawłocki (eds), *Bezstronność sędziego w sprawach karnych w świetle zarzutu wadliwości jego powołania* (CH Beck 2022) 74.

K 12/18, the Polish Constitutional Tribunal indicated that the election of judges-members of the *Krajowa Rada Sądownictwa* by the parliamentary chamber was considered an acceptable way of shaping the composition of the *Krajowa Rada Sądownictwa*.¹⁸⁸ This judgment, by virtue of Article 190(1) of the Constitution, has at the same time a universally binding character and the value of finality in Poland. The universally binding force of the Constitutional Tribunal's judgements - according to the hitherto prevailing view - obliges all other organs of public authority, including the organs of the judiciary, to respect and apply these judgements. In this respect, there is a lack of any legal means to challenge the substantive ruling of the Constitutional Tribunal. Neither is such competence granted to the European Court of Human Rights, or the Court of Justice of the EU, which, however, would not be prevented from assessing in their rulings the constitutionality of the national law differently than the national constitutional court did, although this assessment took place formally on different levels.

An additional 'flavour' to the existing dispute in this regard is added by the fact that both European tribunals have noted the jurisprudence of the Polish Constitutional Tribunal, disregarding it (in fact deeming it non-existent) due to the status of certain judges of the Polish Constitutional Tribunal, in connection with the controversial circumstances of their appointment, which is supposed to prove that the Polish Constitutional Tribunal in formations with such judges is not supposed to meet the European standard of a court established by law. This was the case, for example, in the ECtHR judgment of 7 May 2021 in the case of *Xero Flor v. Poland* (application no. 4907/18), being a source for subsequent views of the European Court of Human Rights and the Court of Justice of the EU (which treated this circumstance as an axiom in principle).

The Polish Constitutional Tribunal's reaction was not long in coming. The Tribunal, analysing the allegations made against the judges serving on this body, expressed its strong disapproval of the positions adopted by the European tribunals, undertaking a judicial dialogue with the tribunals. In a number of judgements, the Tribunal pointed out, inter alia, that the attempt to overturn the election of certain Constitutional Tribunal judges (as the possible effect of the rulings indicated), thus undertaken, violates the basic standards of a democratic state of law, expressed in Poland in this case in

¹⁸⁸ Dominik Łukowiak, 'Glosa do wyroku Trybunału Konstytucyjnego z 25 marca 2019 r., sygn. akt K 12/18 - wybór sędziów do składu Krajowej Rady Sądownictwa przez Sejm' (2019) 3 Przegląd Konstytucyjny 101.

Articles 7, 10 and 173 of the Polish Constitution. The Tribunal argued that the attempt to repeal the effects of the election of judges clearly violates the principle of separation of powers provided for in Article 10 in conjunction with Article 173 of the Polish Constitution, confirming the independence of the Tribunal and thus the independence of its judges.¹⁸⁹ In conclusion,

¹⁸⁹ In its judgment of 24 November 2021, K 6/21, the Polish Constitutional Tribunal ruled that Article 6(1) 1st sentence of the European Convention on Human Rights, insofar as it grants the European Court of Human Rights the competence to assess the legality of the election of judges of the Polish Constitutional Tribunal, is incompatible with the Polish Constitution. The Tribunal emphasised that there are no legal or factual grounds to question the status of any of the judges sitting in the Polish Constitutional Tribunal. There are no mechanisms in the Polish legal order to verify the correctness of their election. Even more so, it is inadmissible for any international body to make an assessment in this regard. Cf. *Trybunał Konstytucyjny: 24 November 2021, K 6/21 (2022) OTK-A 9*.

With regard to the ECHR judgment of 7 May 2021 in the case of *Xero Flor v. Poland*, the Polish Constitutional Tribunal in its judgment K 6/21, finding Article 6(1) of the European Convention of Human Rights to be incompatible with the Polish Constitution, stated, inter alia, that the Tribunal assesses the constitutionality of a provision of an international agreement in the sense given to it by the European Court of Human Rights in its adjudication process. In such a situation, the Polish Constitutional Tribunal fulfils the constitutional role of the ‘court of last word’. In fulfilling its role, the Tribunal is obliged to uphold the sovereignty of the Republic of Poland and cannot allow the European Court of Human Rights, using its adjudicatory competence in the field of international human rights, to interfere in the legal system of Polish constitutional bodies. Poland, by ratifying the Convention, has not consented to the jurisdiction of the European Court of Human Rights in this respect. In turn, the duty of the Tribunal is to defend the Polish constitutional identity. The purpose of this is to control whether a norm with the content shaped in the case law of the European Court of Human Rights fits into the Polish constitutional system from the perspective of the principle of supremacy of the Constitution, expressed in its Article 8(1).

In its judgment of 10 March 2022, K 7/21, the Polish Constitutional Tribunal ruled that Article 6(1) 1st sentence of the European Convention of Human Rights is incompatible with the constitutional benchmarks of control to the extent that: 1) the notion of ‘rights and obligations of a civil nature’ includes the subjective right of a judge to occupy an administrative function in the structure of the ordinary judiciary in the Polish legal system, 2) when assessing the fulfilment of the condition of a ‘court established by law’, it allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, laws and judgments of the Polish Constitutional Tribunal, and allows the European Court of Human Rights or national courts to independently create norms concerning the procedure for the nomination of judges of national courts in the process of interpreting the Convention, and empowers the European Court of Human Rights or national

the Polish Constitutional Tribunal took the position that any attempt to undermine the status of the judges of the Constitutional Tribunal, both by national and international bodies, is a significant violation of the powers of the Polish constitutional authorities and violates the constitutional principle of the division and balancing of powers.¹⁹⁰

In assessing the activity of the second European tribunal - the Court of Justice of the EU - the Polish Constitutional Tribunal, in turn, reflected, *inter alia*, on the limits of the competence of the CJEU as regards the law-making interpretation of European law precisely in the sphere of the organisation of the judiciary in an EU Member State, which concerned, among other things, the questioning of the status of judges appointed in accordance with the legislator's concept, current at the time of their appointment, expressed in a law assessed by the national constitutional tribunal as compliant with the national constitution. Against this background, in its 2021 judgment, K 3/21, the Polish Constitutional Tribunal held, *inter alia*, that the second paragraph of Article 19(1) in conjunction with Article 2 TEU, understood

courts to assess the compliance with the Constitution and the Convention of laws concerning the organisation of the judiciary, the competence of courts and the act defining the system, scope of activities, procedure of work and method of election of members of the *Krajowa Rada Sądownictwa*. Cf. *Trybunał Konstytucyjny*: 10 March 1999, K 7/21 (2022) OTK-A 24.

In other judgments, including the judgements of 14 July 2021, P 7/20, of 7 October 2021, K 3/21, of 23 February 2022, P 10/19, the Constitutional Tribunal considered completely unfounded the argumentation relating to the alleged effects of the *Xero Flor* judgment. The Constitutional Tribunal recalled that, in that judgment, the European Court of Human Rights unauthorisedly exceeded its jurisdiction by assessing the legality of the formation of the composition of the Constitutional Tribunal. In the view of the Polish Constitutional Tribunal, this is an unprecedented encroachment into the competences of the constitutional authorities of the Republic of Poland - the Sejm, which elects the judge, and the President, to whom the elected judge takes the oath. The conclusions undermining the correctness of the selection of judges of the Constitutional Tribunal by the Sejm in 2015, on which the European Court of Human Rights based its ruling, prove - in the opinion of the Polish Constitutional Tribunal - both the lack of knowledge of the Polish legal order and the jurisprudence of the Constitutional Tribunal itself. Cf. *Trybunał Konstytucyjny*: 14 July 2021, P 7/20 (2021) OTK-A 30; *Trybunał Konstytucyjny*: 7 October 2021, K 3/21 (2022) OTK-A 65; *Trybunał Konstytucyjny*: 23 February 2022, P 10/19 (2022) OTK-A 14.

¹⁹⁰ This position was criticised by part of the Polish doctrine, pointing, *inter alia*, to the need to strive for a uniform standard of impartiality and independence of the judge in the EU, which the jurisprudence of the Polish Constitutional Court was said not to understand.

as empowering a court to review the independence of judges appointed according to the national law in force at the time, was incompatible with the Polish Constitution.¹⁹¹

It should be clarified that this norm - following the CJEU case-law - was intended to confer a number of previously unknown competences on Polish courts, in particular to apply the law in disregard of constitutional provisions and Constitutional Tribunal rulings and to carry out a review of the President of the Republic of Poland's decisions on the appointment to the office of a judge, only on the grounds that the judge was nominated to the office at the request of the *Krajowa Rada Sądownictwa* whose composition, inter alia, was challenged in European case-law (due to a legal change in which the selection of the judicial part of this council by judges was replaced by the selection done by parliament).

The Polish Constitutional Tribunal emphasised in its argument that it is clear that the EU only has competences granted by the Member States acting on the basis of their constitutions, and that the European Union acts *ultra vires* if it exceeds the limits of the competences conferred by the Treaties. Such infringement may not only take the legal form of regulations, directives and decisions, but may also take the form of CJEU rulings.¹⁹² The Tribunal also recalled that, as a rule, the prevailing position in the judgments of the constitutional courts of the Member States is that the constitution constitutes the hierarchically highest law in the state.¹⁹³ This is also apparent from the case law of the German Federal Constitutional Court or the Spanish Constitutional Court, which take the view that the limit of consent for the development of the European Union lies where the Member States would begin to lose their statehood (sovereignty - constitutional identity).¹⁹⁴

Indeed, undoubtedly the German Federal Constitutional Court in the dispute between the national authorities and the EU authorities has

¹⁹¹ Katarzyna Kos, 'Shaping the Relationship Between the Polish Constitution and European Union Law in the Adjudication of the Constitutional Tribunal' (2022) 6 *Przegląd Prawa Konstytucyjnego* 427.

¹⁹² The Polish Constitutional Tribunal referred, inter alia, to views derived from the work: Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 *Common Market Law Review* 395.

¹⁹³ Cf. Sven Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* (Mohr Siebeck 2016) *passim*.

¹⁹⁴ *Bundesverfassungsgericht*: 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (2009) BVerfGE 123.

taken a position, as it were, in favour of national law. It has argued, for example, that *ultra vires* scrutiny, as well as scrutiny of the EU authorities' respect for the German constitutional identity, can lead to EU law being declared inapplicable on the territory of the Federal Republic of Germany by the Federal Constitutional Court.¹⁹⁵ Similarly, according to the Spanish Constitutional Court (*Tribunal Constitucional*), the principle of primacy of EU law does not imply hierarchical supremacy and is expressly limited to the competences granted to the European Union. Thus, it does not have a general scope but refers only to the exclusive competences of the European Union. Their limits are set by the principle of conferral. Primacy therefore only refers to competences transferred to the European Union by the sovereign will of the state.¹⁹⁶

The Polish Constitutional Tribunal - in the context of the aforementioned dispute concerning the Polish judiciary - referred to the case law of the CJEU as follows: if the interpretation made by the CJEU indicates the obligation of a certain action or omission, creating general and abstract orders or prohibitions relating to the validity and application in a member state of provisions of constitutional rank, understood by some courts as an abrogation of the principle of supremacy of the constitution, or as a consent to abandon the application of constitutional norms in favour of the application of norms resulting from the CJEU jurisprudence, then the duty of the Constitutional Tribunal, arising in Poland directly from Article 8(1) of the Polish Constitution, is to reconstruct such an interpretation, and if it is found that it does indeed have normative effect, to adjudicate in the prescribed mode on the compliance or non-compliance of the result of such an interpretation (legal norm) with the Polish Constitution.¹⁹⁷

In doing so, the Polish Constitutional Tribunal pointed out that a factual state of affairs in which the CJEU's law-making interpretation has no boundaries whatsoever may lead to a situation in which it is the CJEU, and not the sovereign states-parties to the treaty, that arbitrarily and independently determines the framework of integration, in particular the framework of the ever closer union of the Member States, which is undoubtedly a matter for the treaties. Certainly, the interpretation of EU primary law cannot lead to *de facto* changes to the treaties. By accepting *acquis communautaire*, the

¹⁹⁵ *Bundesverfassungsgericht*: 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 (2020) BVerfGE 154.

¹⁹⁶ *Tribunal Constitucional de España*: 13 December 2004, 1/2004, BOE-T-2005-111.

¹⁹⁷ *Trybunał Konstytucyjny*: 7 October 2021, K 3/21 (n 189).

Republic of Poland, as well as other Member States, did not consent to the unconditional operation of the principle of primacy of EU law in the national legal system, let alone to the unlimited creation of legal norms by the CJEU enjoying the value of priority of application over the Polish Constitution.¹⁹⁸

In assessing the legal norm created by the CJEU, the Polish Constitutional Tribunal consequently argued that EU membership does not deprive a Member State of the right to determine its internal organisation. European law does not indicate the authorities or procedures competent to deal with matters in the Member States, but contains substantive norms of EU law, which should be observed and applied in the Member States. In contrast, the organisation of the judiciary, including the establishment of appropriate guarantees of the independence of courts and the impartiality and independence of the judges, is a matter for the Member State alone. It is, in the opinion of the Polish Constitutional Tribunal, interference with this competence of the Member State which, according to the Polish Constitutional Tribunal, determined the unconstitutionality of the norm set out by the CJEU in its ruling.¹⁹⁹

¹⁹⁸ The opinion of the Polish Tribunal has been criticized, cf., e.g. Sára Kiššová, 'An Overview of the Doctrine of Ultra Vires from the Perspective of the German Federal Constitutional Court and the Polish Constitutional Court' (2022) 2 Slovak Yearbook of European Law 33.

¹⁹⁹ The issue of the European Union's competence had already been examined by the Polish Constitutional Tribunal, including in a situation where its composition was not in dispute. The Constitutional Tribunal dealt with this problem in the context of the institution of the transfer of state competences, based on Article 90 of the Polish Constitution. A statement on the subject may be found, for example, in the judgement of the Constitutional Tribunal of 11 May 2005, K 18/04. It follows that the delegation of competence 'in certain matters' must be understood both as a prohibition of the delegation of the entirety of competences of a given body, the delegation of competences in the entirety of matters in a given field, and as a prohibition of the delegation of competences as to the essence of matters determining the competence of a given organ of state authority. It is therefore necessary both to define precisely the areas and to indicate the scope of the competences to be transferred. There is no basis for the assumption that, in order to comply with this requirement, it would be sufficient to retain in a few matters, even if only for the sake of appearances, competences within the competence of constitutional bodies. Actions as a result of which the transfer of competences would undermine the sense of existence or functioning of any of the organs of the Republic would moreover remain in clear collision with Article 8(1) of the Polish Constitution. As the limit of the transfer of competence referred to in Article 90(1) of the Polish Constitution, the Tribunal indicated the authorisation to enact legal acts or take decisions that would be contrary to the Constitution. In particular, the norms indicated in the jurisprudence

The indicated doubts and the ongoing dispute or dialogue between the Polish Constitutional Tribunal and the European Court of Human Rights and the Court of Justice of the EU show that differences in the perception of certain elements related to the organisation of the judiciary in general, as assessed from the perspective of different Member States, as well as an attempt to generally assess the same elements from the perspective of the uniformity of law in Europe, is not the easiest task.²⁰⁰ Certainly these doubts inspire further, more detailed research. The need to reach the sources of current national solutions, and their constitutional identities, can only give rise to further discussion on the existence or - perhaps - the creation of a European standard of an impartial and independent judge capable of forming an independent court.²⁰¹ It seems, however, that against the

may not serve to delegate competence to the extent that would make the Republic of Poland unable to function as a sovereign and democratic state (judgment of the Constitutional Tribunal of 11 May 2005, K 18/04). This issue was also developed in later rulings, where the Polish Constitutional Tribunal repeated its previous findings concerning the nature of Article 90 of the Polish Constitution and the scope of the transfer of competences (judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, or precisely the judgment of the Constitutional Tribunal of 7 October 2021, K 3/21). Cf. *Trybunał Konstytucyjny: 11 May 2005, K 18/04* (2005) OTK-A 6; *Trybunał Konstytucyjny: 7 October 2021, K 3/21* (n 189). Currently, this is one of the axes of the dispute as to the formation of the standard of an impartial and independent judge capable of forming an independent court. This case law is discussed e.g. by Mariusz Muszyński, 'Działanie TSUE ultra vires a Trybunał Konstytucyjny RP' (2022) 9 *Prokuratura i Prawo* 5.

²⁰⁰ Csongor Istvan Nagy, 'The Rebellion of Constitutional Courts and the Normative Character of European Union Law' (2024) 73 *International & Comparative Law Quarterly* 65.

²⁰¹ The assessment expressed against the background of the construction of the Polish *Krajowa Rada Sądownictwa* based to a large extent on the Spanish concept must be puzzling in the context of further possible consequences of the law-making activity of the Court of Justice of the EU assessing the Polish council as being too politically influenced, e.g. in Spain or Germany, taking into account that the vast majority of the Spanish judicial council is elected by the parliament, while in German law, due to the lack of such council, the main link in the process of selecting judges are representatives of the executive power (politicians). It should be noted in this regard that the European Commission, for example, has formulated critical comments on the Spanish judicial council in, inter alia, the 2020 and 2021 Rule of Law Report, Country Chapter on the Rule of Law Situation in Spain [Reports SWD(2020) 308 of 30 September 2020 and SWD(2021) 710 of 20 July 2021] highlighting concerns that 'it might be perceived as vulnerable to politicisation'. Against the background of the discussion that took place in Spain, also the Council of Europe recalled that the European standards provide that at least half of the council's members should

background of the jurisprudence of the European tribunals, it is the final effect of national solutions (an independent court established by law) that should be the focus rather than internal national measures that prevent this effect from being realised.

Thus, as can be seen, despite a certain diversity of solutions in individual countries, in practice one can observe certain tendencies towards the search for a uniform European standard, attempts to model the European judicial area, in which the two European tribunals (ECHR and CJEU) are leading the way. There is no doubt that this area is developing, and the relevant disputes or the existing dialogue between national and European authorities seem to be conducive to further, albeit peculiar, evolution of this area. The matter of the use of artificial intelligence in courts, which has so far not been of interest to the European courts in the context of the exercise of judicial power, can draw useful reference from the positions expressed so far in the ongoing dialogue between constitutional courts and tribunals. There is no doubt that the creation of future standards for the use of artificial intelligence in the judiciary must be based on current models, paradigms of an independent court, as well as independent and impartial judges. And although these standards - as it can be preemptively stated - are not fully specified and one can rather speak here of negative standards than positive ones, the most difficult tasks seem to be the adaptation of these standards to the algorithmic reality. It can be estimated with a high degree of probability that in the future

be judges elected by their peers from all levels of the judiciary. This position was contained, *inter alia*, in a letter from the President of GRECO (Directorate General Human Rights and Rule of Law. Group of States Against Corruption) of 14 October 2020. Such a position follows, *inter alia*, from paragraph 27 of Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. Indeed, it must be noted that the CJEU, in the aforementioned position on the changes to the law in Poland as regards the formation of the *Krajowa Rada Sądownictwa*, departs from the position expressed in its earlier case-law, from which it follows that the fact that a body such as the *Krajowa Rada Sądownictwa* participating in the process of appointing judges, consists predominantly of members elected by the legislature, cannot in itself give rise to doubts as to the status of a court previously established by law and as to the independence of the judges selected in that process (*Court of Justice of the European Union: 9 July 2020, C-272/19, ECLI:EU:C:2020:535*). Cf. Pablo Castillo-Ortiz, 'The Politics of Implementation of the Judicial Council Model in Europe' (2019) 11 European Political Science Review 503; Bianca Selejan-Guțan, 'Romania: Perils of a "Perfect Euro-Model" of Judicial Council' (2020) 19 German Law Journal 1708.

national constitutional courts will argue with the European tribunals in this area. The current discussion about the standards for the appointment of judges, and therefore about the sources of judicial power, seems to be a suitable 'foreground' for such a future discussion about the exercise of justice by artificial intelligence. This is because, for example, bodies such as judicial councils could play an important role in the future administration of algorithmic justice, as will be discussed later.

In doing so, it is desirable to shape this area in such a way as to be harmonious, if only to avoid disputes such as those outlined above, which create the danger of confusion as to the existence of a standard of the right to a court in the EU countries.

1.4. Summary

From the above, it is already apparent, at first glance, that comparing the different legal systems in terms of the search for a standard for the exercise of judicial power can be an interesting research area. The general solutions concerning judicial authority and the exercise of justice already provide research material that should be subjected to a detailed and more in-depth study, with reference to certain details of current normative solutions.

The differences in Spain, Poland and Germany with regard to the constitutional position of the judiciary must be puzzling, especially in the context of modelling a European standard of administration of justice, which has already been addressed more than once at the European level by various bodies (especially the European tribunals: the CJEU and the ECtHR). *Prima facie*, however, it seems that respect for the constitutional traditions of the Member States may be difficult to reconcile with the desire to establish a uniform European standard of administration of justice. Meanwhile, European solidarity - a sense of community and, at the same time, shared responsibility for the success of common action - tends to lead to the need to seek such a standard, even as the existing legislation and practice of the EU and its Member States reflects it to varying degrees and extents

Perhaps, however, the differences between the various legal systems are reconcilable, especially when the historical context of the development of the law in the individual countries is taken into account. Germany, Spain or Poland, in the context of the proper functioning of the judiciary, all have their 'flaws', so that the current shape of the systemic solutions seems to be -

at least as may be thought - a kind of remedy for the 'sins' of the past.²⁰² The 'sins' of the present are, in turn, related, among other things, to protracted court proceedings, the excessive waiting of citizens for justice to be served. Whether artificial intelligence, which is not regulated at a constitutional level in any European country, has a chance to redeem these 'sins', marginalise them and bring the justice system to a state of efficiency - these are questions that at this stage of deliberations still remain unanswered. For, as one may think, after outlining the idea of comparative research on the judiciary, the next stage of deliberations should be an attempt to reconstruct the standard of a tribunal established by law and the standard of an independent and impartial judge as conditions for the proper functioning of the judiciary in a democratic state. Only against such a background will further exploration be possible.

²⁰² Lukas Kinttrup, *Europarecht als Weichenstellung zur institutionellen Unabhängigkeit deutscher Justiz?* (Nomos 2024) 139 ff.

Chapter 2. Contemporary attributes of courts and judges. The right to a fair trial as a prerequisite for the proper functioning of the judiciary in a democratic state

2.1. General comments

The considerations so far already show, at least *prima facie*, that today's view of the judiciary cannot be seen from a single perspective only, especially when it is that of a single Member State of the European Union or of the Council of Europe. Indeed, it is already apparent from the examples presented and the analysis made at a general level that the bodies of the European Union and the Council of Europe are striving to harmonise the rules of administration of justice at supranational level.²⁰³ This aspiration constitutes an important scene of European jurisprudence, especially in relation to the dialogue between the constitutional courts of the Member States and the European tribunals.²⁰⁴ This dialogue concerns not only the consideration of the shaping of the standard of European judiciary, but also - and (more recently) perhaps even primarily - the mutual competences to shape this standard. However, in spite of the significant objections that arise in the public space and in the judicial activity of the constitutional courts of the individual states, there is no doubt that also in the future the opinion of the European tribunals will be of vital importance for the creation of standards for the exercise of judicial power.²⁰⁵ This will also be the case in

²⁰³ Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009) 97 ff.

²⁰⁴ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 225 ff.

²⁰⁵ Elina Paunio, 'Conflict, Power, and Understanding - Judicial Dialogue between the ECJ and National Courts' (2010) 6 No Foundations 7.

the era of artificial intelligence, the development of which will force the need to rethink the previous output of each of these institutions.

The turmoil, both in media spaces and in institutional spaces in EU Member States and the Council of Europe, the various internal conflicts, subsequently transferred to the European arena, have some time ago become an element of a broader discussion aimed at seeking European standards of judiciary, and attempts to model European justice. The two most important European tribunals (ECtHR and CJEU) have taken part in this modelling and will continue to do so. In the dispute over the sources of judicial authority, including, inter alia, the method of appointing judicial positions, the European *acquis* continues to develop, resulting in a relatively large number of judgments by the above-mentioned tribunals in recent years. This *acquis* is based on a concept which is one of the fundamental assumptions of a democratic state, namely the right of access of citizens to justice in order to enable them to defend their interests before an independent body guided exclusively by the law applicable in the state. In the tradition of constitutional law, this idea dates back to the first constitutions; it was already known to the first European constitution, the Polish Constitution of 3 May 1791, which indicated, inter alia, that the judicial power should be organised in such a way that every person would find justice (Article VIII).²⁰⁶ It should come as no surprise, then, that this idea has developed over the years, and its current form (which is still evolving) is based on a combination of at least three sources of inspiration: 1) the achievements of doctrine; 2) the jurisprudence of constitutional courts; 3) the jurisprudence of international tribunals (including the ECtHR and the CJEU).

As one of the foundations of the state, 'the right to a court' - because this is the form under which the idea of the protection of the interests of the individual has been shaped in the science of constitutional law - appears in scientific nomenclature primarily in two senses. Firstly, it refers to the possibility to apply to the court for legal protection, which is an expression of, for example, the concept of 'the right of action' (*Klagerecht*) initiated in German civil proceduralism.²⁰⁷ Secondly, the doctrine of constitutional law points to the importance of 'the right to a court' as a right of access to a body that fulfils certain characteristics, which is supposed to make that body

²⁰⁶ Richard Butterwick, *The Constitution of 3 May 1791. Testament of the Polish-Lithuanian Commonwealth* (Muzeum Historii Polski 2021) 131 ff.

²⁰⁷ Predrag Sunaric, *Die Richtige Partei Im Zivilprozessualen Erkenntnisverfahren* (Mohr Siebeck 2018) 11 ff.

‘competent’. In this first sense, it is thus a subjective right of the individual against the state, sometimes referred to as ‘the right to due process’.²⁰⁸ In the second sense, on the other hand, it is a law-making directive addressed to the legislator, referred to as the ‘right to access to justice’.²⁰⁹ However, this nomenclature is not universally used. As explained earlier, several terms used in practice essentially fall within the current wording of ‘the right to a fair trial’.

For many years, the procedural nature of the right to a court has been emphasised,²¹⁰ stressing in this area above all the right of access to a court, the right to an adequate judicial procedure and the right to a court judgment, which values have been developed accordingly in doctrine and jurisprudence. Attention was drawn to the characteristics that the justice system must fulfil, recognising at a certain stage of development that, in addition to procedural guarantees, guarantees of a systemic nature are also necessary. In this way - over the years - there has been a recognition of two further values necessary for the formation of the right to a court in democratic states, i.e. the standard of an independent tribunal established by law and the standard of an independent and impartial judge.²¹¹ Finally, the publicity of court proceedings²¹² has emerged as an important element of a modern justice system, linked to public confidence in the courts. A cumulative assessment of all the elements that make up the right to a court - now more commonly referred to as ‘the right to a fair trial’²¹³ - can lead to a position as to whether or not citizens’ rights are being realised.²¹⁴

Access to justice has been a significant problem in the administration of justice over the centuries. Many people were, and unfortunately still are,

²⁰⁸ Daniel O Conkle, ‘Three Theories of Substantive Due Process’ (2006) 85 North Carolina Law Review 63.

²⁰⁹ Deborah L Rhode, *Access to Justice* (Oxford University Press 2004) 5 ff.

²¹⁰ Simona Grossi, ‘Procedural Due Process’ (2016) 13 Seton Hall Circuit Review 155.

²¹¹ Rizcallah and Davio (n 38).

²¹² Szonja Navratil, ‘A Comparative Overview of Publicity in the Administration of Justice’ in Attila Badó (ed), *Fair Trial and Judicial Independence. Hungarian Perspectives* (Springer 2013) 177-196.

²¹³ This term will be used below in this format, taking into account its hybrid nature.

²¹⁴ Gerald Goecke, ‘Wahrnehmungsherrschaft über die Beweiserhebung und das Recht auf ein faires Verfahren’, *Welche Reform braucht das Strafverfahren?, Texte und Ergebnisse des 39. Strafverteidigertag* (2016) 9 ff.

outside judicial protection.²¹⁵ Nowadays, when many argue that judicial protection has become a meta-norm, capable of overriding even conflicting primary EU law that would preserve the discretion of the political EU institutions or the procedural autonomy of the Member States,²¹⁶ there are still many individuals around the world who remain *de facto* without access to the courts. Although this is not generally the case in European countries, the growing crisis in the administration of justice centred around the increasing number of cases, or the prolonged queues for their resolution, and thus the protracted waiting times to receive justice, can lead to a secondary violation of the right of access to court, which has already been mentioned as an idea in the case law of the European tribunals, in the context of 'the right to access to justice'.²¹⁷

This is why solutions are being sought to avert such a crisis, to prevent it from spreading. If Europe wants to be a stable continent, its justice system must function efficiently. Perhaps the way to ensure this efficiency is through the large-scale use of artificial intelligence in European justice. This is certainly implied in many places.

For this to happen, however, artificial intelligence must guarantee the implementation of certain standards that have shaped European judiciary over the years. The most important from this point of view - as one may think - are the constitutional guarantees shaping the standard of an independent tribunal established by law and the standards of an independent and impartial judge. It is these standards that can be the starting point for considering the procedural guarantees for the realisation of the right to a fair trial and thus, among other things, the search for tools to improve efficiency of the administration of justice. Therefore, these standards, in their current - as can be thought - (still) traditional formulation, will be considered below. First of all, the problem of the origin of the judicial authority related to the judicial appointment system will be explored in order, *inter alia*, to answer the question of whether any significant obstacles related to the future

²¹⁵ For example, OECD research from 2016 showed that four billion people live outside the protection of the law. Cf. OECD, 'Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All' 2. <<https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>> accessed 30 March 2025.

²¹⁶ Volker Roeben, 'Judicial Protection as the Meta-Norm in the EU Judicial Architecture' (2020) 12 *Hague Journal on the Rule of Law* 29.

²¹⁷ Janneke H Gerards and Lize R Glas, 'Access to Justice in the European Convention on Human Rights System' (2017) 35 *Netherlands Quarterly of Human Rights* 11.

entrusting of the adjudication of disputes to artificial intelligence can already be discerned in European law.

2.2. Contemporary attributes of courts as a guarantee for the realisation of the right to a fair trial

There is no doubt that in recent years issues related to the judicial system and the judiciary have become of particular importance in discussions on European and national law. This discussions include, above all, an attempt to clarify whether the fundamental principles associated with the functioning of the so-called third power provide sufficient guarantees for its independence, in particular whether the conditions developed over the years for the administration of justice meet the needs of society. The monopoly of the courts in the administration of justice requires the creation of guarantees for the fulfilment of this function.²¹⁸ It is therefore the duty of the state to create the systemic, organisational and procedural conditions for the administration of justice by the courts.²¹⁹ These conditions are intended to guarantee the administration of justice by the courts. The state should therefore ensure that the judiciary is properly constituted and organised to enable the courts to fulfil their judicial function.

The basis for the functioning of the courts today is their independence, especially from other branches of state power, which refers to the tradition of the tri-partition of power, which, as is well known, has a long tradition in European states. In relation to this power - the judiciary - the guarantee for the implementation of the Montesquieu tri-partition of power is primarily the principle of independence of the judiciary, which is included at the constitutional level of individual states in a solution emphasising separation and independence from other authorities. This was done, for example, by the German legislature (Article 20(2) of the German Basic Law), and this is also the path followed by the Spanish (Article 117 of the Spanish Constitution) and the Polish (Article 173 of the Polish Constitution) legislatures. This is now a European standard, on which both European tribunals (ECtHR and CJEU) place considerable emphasis, deriving it from Article 6(1) ECHR and Article 47 CFR, as an element of the rule of law. The European Commission

²¹⁸ VM Bolshakova and I V. Kholikov, 'The Fundamental Principles of the Organization of the Judicial System: A Theoretical Study' (2022) 58 Perm University Herald. Juridical Sciences 579.

²¹⁹ Jeffrey Jackson, 'Judicial Independence, Adequate Court Funding, and Inherent Powers' (1993) 52 Maryland Law Review 217.

also attaches great importance to this area, recognising its significant role in the Commission's reports on the rule of law in the European Union, where the Commission analyses, among other things, the functioning of the judiciary in individual countries.²²⁰ In European legal culture, therefore, it is clear that the relationship between the judiciary and the other authorities, i.e. the legislature and the executive, must be based on the principle of separation.²²¹

The regulation of the court system is of secondary importance to the right of everyone - guaranteed at the constitutional and international level - to have his or her case examined fairly, openly and without undue delay by a competent and independent court with impartial and independent judges. The reliability of the courts' operation as their constitutional competence therefore means, above all, their independence,²²² while other characteristics, including efficiency emphasised previously - a characteristic that may be relevant from the point of view of the possibility of using artificial intelligence in the judiciary - are guarantees of their proper functioning in practice. At the international level - from the point of view of European states - the paradigm of these guarantees should be sought in the content of the already mentioned Article 47 CFR or Article 6(1) ECHR, as will be discussed later.

As is repeatedly pointed out, the purpose of the principle of the separation of powers is to exclude arbitrariness of the state and abuses of power by state authorities, thus protecting human dignity and freedom. In the German literature, for example, it is argued in this context, *inter alia*, that people's freedom can only be effectively guaranteed if there are independent, neutral institutions - the courts - which, in cases of dispute or doubt, effectively enforce the binding of the law against other state authorities. The rule of law substantially implemented by the courts becomes a counterbalance to the authority in the state and society, which tends to emancipate itself. In doing so, the power of the courts is structured, disciplined and constrained

²²⁰ This is the case, *inter alia*, in the Rule of Law Report studies. Cf. 2024 Rule of law report, <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en> accessed 30 March 2025.

²²¹ Koen Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 *Common Market Law Review* 11.

²²² Sevastian Blendea, 'Establish the Principle of Separation of Powers in Constitution of States from European Union' (2015) 1 *Annals of the 'Constantin Brâncuși' University of Târgu-Jiu. Letters and Social Science Series* 36.

by means of the law.²²³ The organs of power, within which the courts as organs of judicial power must also function, and cannot function in isolation from each other, although this is difficult from the point of view of the distinctiveness of judicial power. Besides, as pointed out in the previous chapter, the constitutional identity of individual states may significantly impinge on this problem, and what appears to be standard in one country may raise significant questions in another. Hence the system of checks and balances developed in American constitutional law,²²⁴ the mutual control of individual authorities, which is making its way into European constitutional law with greater or lesser force.²²⁵ The concept involves a certain system of 'checks' and 'balances', the aim of which is to counteract excessive interference by one authority in the sphere of competence of another, while at the same time ensuring the necessary cooperation between authorities. This is of particular interest in countries such as Germany or Spain, but also in Poland, where the type of state is based on the principle of the unity of the sovereign people and does not recognise any other source of authority than that which arises from the will of the people expressed in the exercise of the right of access to public office and the direct or indirect participation of citizens in public affairs.²²⁶ State authority, and therefore also judicial authority, is closely linked to other characteristics of a constitutional state, especially in terms of compliance with the law (the rule of law).²²⁷

However, in order to reflect on independent courts, it is first necessary to define what a 'court' is, to clarify the concept. The term is not defined in the context of individual constitutional provisions in specific countries, although it is usually referred to in the context of the right to a court and

²²³ Stephan Rixen, 'Justizgrundrechte' in Markus Möstl, Klaus Stern and Helge Soda (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund. Die einzelnen Grundrechte*, vol IV (CH Beck 2022) § 133.

²²⁴ Rafael La Porta and others, 'Judicial Checks and Balances' (2004) 112 *Journal of Political Economy* 445.

²²⁵ Grzegorz Kuca, *Zasada podziału władzy w Konstytucji RP z 1997 roku* (Wydawnictwo Sejmowe 2014) *passim*.

²²⁶ Luciano Parejo Alfonso, 'Artículo 1' in Pablo Perze Tremps, Alejandro Saiz Arnaiz and Carmen Montesinos Padilla (eds), *Comentario a la Constitución Española. 40 Aniversario. Libro-Homenaje a Luis López Guerra. Tomo I* (Tirant lo Blanch 2018) 113 ff.

²²⁷ Juan María Bilbao Ubillos, 'Spain as a Democratic State Governed by the Rule of Law and the Catalan Secessionist Process' (2024) 16 *Hague Journal on the Rule of Law* 3.

the resulting right to a fair trial. Indeed, individual constitutions generally indicate in their wording that everyone has the right to a court, which must imply recognition of the importance of the courts in determining the status of the individual in all situations in which this may be needed.

Review of constitutional law literature leads to the conclusion that in legal science the term 'court' has at least three approaches: systemic, institutional and functional. In the systemic formulation, it is about defining the location of bodies whose task is to resolve disputes (legal protection) in the system of a given state. In institutional terms, it is about specific institutions in the state carrying out the legal protection tasks assigned to them. It is the set of bodies responsible for the exercise of jurisdiction. In functional terms, on the other hand, it is about the administration of justice, the undertaking of jurisdictional activities. Thus, in this context, it is about organising a political and institutional system, which performs its functions in a proper way, enabling individuals to turn to the competent authority (court) in any situation with a request for determination of their legal status.²²⁸ This refers primarily, but not exclusively, to situations of violation of their rights and freedoms, but also to situations where the individual feels ambiguity, uncertainty or fear of a possible future violation of their rights and freedoms. All legal relations and situations that can be classified as legitimate rights or interests under positive law are therefore subject to judicial protection in accordance with constitutional requirements. It is impermissible for the legal system to deny access to judicial protection to what it classifies as legitimate interests as rights.²²⁹

The courts that form the judiciary are a polycentric and decentralised organic complex, where jurisdictional power is assigned to a large number of actors that are part of the overall system. Nowadays, in democratic states, there is no single judicial power, but rather various entities with jurisdictional power that constitute the courts.²³⁰ Different constitutions assign jurisdictional power to different types of bodies, which have different legal status and powers. Therefore, in the structure of the different states, one can see different bodies exercising justice at different levels, which is most

²²⁸ Brendon T Byrne, 'The Role of the Judiciary in the Modern Institutional State' (1980) 11 Seton Hall Circuit Review 653.

²²⁹ Díez-Picazo Giménez (n 42) 650.

²³⁰ Ryan C Williams, 'Jurisdiction as Power' (2022) 89 University of Chicago Law Review 1719.

clearly seen in the case of Germany or Spain, states with a complex internal structure (Länder, autonomous communities).

Jurisdiction is a function of the state, for the exercise of which the state grants the necessary powers to certain authorities. Jurisdictional power is the legal situation of the authority necessary for the exercise of the jurisdictional function. Abolition of private judiciary (resulting from constitutional provisions) and the existence of *de facto* state monopoly of jurisdiction²³¹ requires individuals to use state bodies in order to have their legal situation recognised by the legal system, making access to justice a right of individuals and thus creating a public subjective right.²³²

The administration of justice, the exercise of jurisdiction, is part of state sovereignty. Already from this constataion, it follows that jurisdiction must be exercised exclusively by state organs, on behalf of the state. In cases where jurisdiction is exercised by non-state actors or bodies, it is the sovereign responsibility of the state to recognise the consequences of this activity.²³³ Jurisdiction serves to resolve conflicts of interest in society. For the construction of the concept of jurisdiction, however, this feature is of a meta-legal nature. It is a sociological fact that cannot be ignored, but it is not essential to the notion of jurisdiction insofar as conflicts of interest usually lie at the heart of jurisdictional activity, jurisdiction is not the only means of resolving conflicts and, above all, conflict is not a necessary condition for jurisdictional activity.

One characteristic of judicial jurisdiction is that the operation of the law it produces is irrevocable. Characteristics such as irrevocability or the power of *res iudicata* are inherent in the jurisdictional application of law. Jurisprudence as a function of the state is inconceivable without the institution of finality and the institution of substantive *res iudicata*, both of which should be effective (to a greater or lesser extent) in the various legal systems. It is the role of the state to create such a system that allows the

²³¹ Geoffrey C Hazard Jr., 'A General Theory of State-Court Jurisdiction' (1965) 1965 Supreme Court Review 241.

²³² Adam N Steinman, 'Access to Justice, Rationality and Personal Jurisdiction' (2018) 71 Vanderbilt Law Review 1401.

²³³ Stefan Machura, 'Civil Justice: Lay Judges in the EU Countries' (2016) 6 Oñati Socio-Legal Series 235.

conflict between the parties to be resolved, in a final way, enabling the state apparatus to then enforce such a final resolution.²³⁴

The judiciary is a set of organised bodies (courts) within individual states, characterised by a certain hierarchy, competence or simply a place in the elaborate structure of the justice system. The organisation of the judicial system in individual states involves the formation of an administrative division of competences around the judiciary, as well as an autonomous (national) system of appointments to the judiciary, i.e. the rules for taking up judicial positions.²³⁵ Until recently, these issues seemed to be an internal matter for the Member States,²³⁶ remaining in a way outside the competence of the Council of Europe and, in particular, the European Union to shape them. Nowadays, this matter does not seem so obvious.²³⁷

Looking at the jurisprudence of the European tribunals, it is noticeable that, in the context of the issues shaping the current standard for the exercise of judicial authority, this jurisprudence has evolved over the years. Considerations on this subject have already appeared in the case C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, where the CJEU, in its judgment of 19 September 2006²³⁸, reconstructed the concept of judicial independence by defining it as an integral element of the judiciary, which requires first and foremost that the adjudicating authority is a third party to the authority that issued the contested decision. The CJEU accepted that the concept has two elements: external and internal. The former presupposes the protection of the body from interference and external pressures that might jeopardise the independence of judgement by its members of the disputes under consideration.²³⁹ The latter, on the other

²³⁴ Daniela Cristina Cret and Mihaela Narcisa Stoicu, 'Theoretical and Jurisprudential Considerations on Res Judicata Authority' (2016) 1 *Tribuna Juridică* 61.

²³⁵ BC Smith, *Judges and Democratization. Judicial Independence in New Democracies* (Routledge 2023) 61 ff.

²³⁶ Arjana Llano, 'The Central and Eastern European Online Library' (2013) 6 *Tribuna Juridică* 109.

²³⁷ Fabio Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' (2010) 17 *Journal of European Public Policy* 1128.

²³⁸ *Court of Justice of the European Union: 19 September 2006, C-506/04, ECLI:EU:C:2006:587.*

²³⁹ François Biltgen, 'L'indépendance du juge national vue depuis Luxembourg' (2020) 123 *Revue trimestrielle des droits de l'Homme* 551.

hand, is linked to the concept of impartiality and relates to an equal distance from the parties to the dispute and their interests in relation to its subject matter and is therefore a requirement of objectivity and the absence of any interest in the specific resolution of the dispute outside the strict application of the law.²⁴⁰

On the basis of this ruling, in a number of subsequent judgments, the CJEU clarified that the above guarantees require the existence of rules, in particular as regards the composition of the body, the appointment of its members, the duration of their term of office and the grounds for their exclusion or removal.²⁴¹ The CJEU has spoken on the issue of the independence of the courts of the Member States in various contexts, but generally none of the statements have directly (yet) addressed the use of artificial intelligence in the judiciary.

The judgment of the CJEU of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16,²⁴² should be regarded as extremely important for the reconstruction of the European standard of an independent court. In this judgment, the CJEU, interpreting the second subparagraph of Article 19(1) TEU, took the opportunity to define the role of the courts of the Member States in the light of EU law and the requirements they should fulfil.²⁴³ The position of the CJEU expressed in this judgment inspired the European Commission to bring actions under Article 258 TFEU against breaches of the rule of law by Member States. Following this judgment, the CJEU has now issued dozens of judgments analysing various components and attributes of courts shaping of the right to a fair trial.²⁴⁴

²⁴⁰ Edyta Krzysztofik, 'The Definition of National Court within the Meaning of European Union Law. Considerations in the Context of the Polish Reform of the Judicial System' (2020) 13 *Teka Komisji Prawniczej PAN Oddział w Lublinie* 247.

²⁴¹ José Santiago Fernández, 'Los tribunales administrativos de recursos contractuales como mecanismos de control en la contratación pública . Perspectiva actual y de futuro' (2015) 66 *Auditoría Pública* 105.

²⁴² *Court of Justice of the European Union: 27 February 2018, C-64/16, ECLI:EU:C:2018:117.*

²⁴³ María José García-Valdecasas Dorrego, 'El Tribunal de Justicia, centinela de la independencia judicial desde la sentencia *Associação sindical dos juízes portugueses (ASJP)*' (2019) 72 *Revista Española De Derecho Europeo* 75.

²⁴⁴ Michał Krajewski, 'Insight *Associação Sindical Dos Juízes Portugueses: The Court of Justice and Athena's Dilemma*' (2018) 3 *European Papers* 395.

The independence of the European Union judiciary - presented by the CJEU as an integrated structure ensuring judicial review in the European Union legal order, in which national courts perform, in cooperation with the CJEU, common tasks aimed at ensuring respect for the law in the interpretation and application of the EU Treaties - has once again been recognised as a fundamental feature of the European Union judiciary.²⁴⁵ According to the CJEU, Member States must ensure that bodies which constitute courts or tribunals under European Union law and which form part of the judicial system in areas covered by European Union law, meet the requirements necessary for the effective judicial protection.²⁴⁶ The main thesis of this line of reasoning of the CJEU is to emphasise that the necessary guarantee of effective legal protection under European Union law is constituted by the constitutive features of courts, in particular one of them - precisely independence. This is to be confirmed by the second paragraph of Article 47 CFR, which lists access to an independent court among the requirements of the fundamental right to an effective remedy.²⁴⁷

This independence is essential to the legal order of the European Union, falling under the principle of the rule of law, which is one of the values on which the European Union is based according to Article 2 TEU, and also falling under Article 19 TEU, which gives concrete expression to this value and entrusts the task of ensuring legal control in this order also to national courts.²⁴⁸ Independence is also a necessary condition for guaranteeing the fundamental right to an independent and impartial court, as provided for in Article 47 of the Charter of Fundamental Rights.²⁴⁹

In several judgments in which the CJEU has dealt with issues of judicial independence of Member States there has been a reference to the

²⁴⁵ Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 *European Constitutional Law Review* 622.

²⁴⁶ F Pereira Coutinho, 'Associação Sindical Dos Juízes Portugueses: Judicial Independence and Austerity Measures at the Court of Justice' (2018) 2 *Quaderni costituzionali* 510.

²⁴⁷ Alessandra Silveira and others, 'União de direito para além do direito da União - as garantias de independência judicial no acórdão Associação Sindical dos Juízes Portugueses' (2018) 1 *Julgar Online* 1.

²⁴⁸ Stanisław Biernat, 'Niezależność sądów i niezawisłość sędziów państw członkowskich w świetle orzecznictwa' (2024) 5 *Przegląd Sądowy* 6, 10 ff.

²⁴⁹ Nuria Magaldi, 'La construcción de un Poder Judicial europeo y las garantías de su independencia' (2022) 125 *Revista Española de Derecho Constitucional* 127.

concept of the right to a fair trial before a tribunal established by law, which refers primarily to Article 47 CFR and is modelled on Article 6(1) ECHR.²⁵⁰ The CJEU has repeatedly emphasised the existence of ‘indissoluble links’ which, according to Article 47(2) CFR itself, exist - for the purposes of the application of the fundamental right to a fair trial within the meaning of that provision of the Charter - between the guarantees of independence and impartiality of judges and access to a tribunal previously established by law.²⁵¹ This applies to the guarantees defining the concept of a court as well as its composition. In this context, the CJEU referred *inter alia* to the case law of the ECtHR.

It can be argued that the requirement of prior establishment of a court by law refers primarily to the proper standardisation of the creation of courts, but also to the issues of the appointment of judges or the formation of the composition of the judiciary. Recently, this concept has become very capacious, as a result of further CJEU case law. In turn, this area is likely to develop further.²⁵²

The need for a broad view of national justice systems through a European prism is therefore justified by the activities of the EU bodies and the Council of Europe in recent years, which have, *inter alia*, led to *de facto* creation of standards that have become, among other things, the basis for changing the organisation of the judiciary in a Member State.²⁵³ Such a situation occurred, for example, in connection with the organisational changes of the judiciary in Poland, which had to be changed as a result of European case law. It is worth tracing this problem.

²⁵⁰ Juan Ignacio Ugartemendía Eceizabarrena, ‘Tutela judicial efectiva y Estado de derecho en la Unión Europea y su incidencia en Administración de Justicia de los Estados miembros’ (2020) 46 *Teoría y realidad constitucional* 309.

²⁵¹ María José García-Valdecasas Dorrego, ‘Estado de derecho e independencia judicial en la jurisprudencia del Tribunal de Justicia de la UE: la consagración de la identidad constitucional europea’ (2022) 82 *Revista Española de Derecho Europeo* 19.

²⁵² Elżbieta Żochowska, ‘The Principle of the Rule of Law From Article 2 of the Treaty on European Union as a Value of the European Union and Its Components as Requirements Imposed on Member States, on the Example of a Judgment of the Court of Justice of the European Union Regar’ (2024) 8 *Eastern European Journal of Transnational Relations* 57.

²⁵³ Koen Lenaerts and José A Gutiérrez-fons, ‘The Autonomy of EU Law, Legal Theory and European Integration’ (2023) 8 *European Papers* 1495.

It is worth mentioning that the dispute was based on the judicial reform carried out in Poland in 2017 concerning the disciplinary judiciary, whose previous dysfunctionality had been raised in the country for a long time (this change was independent of the change concerning the *Krajowa Rada Sądownictwa*).²⁵⁴ It was one of the impulses for the political power to undertake a reform of the disciplinary judiciary in Poland, which set in motion a whole avalanche of events until Poland withdrew from the reform and introduced other solutions instead.²⁵⁵ This matter is interesting insofar as the reasoning guiding the EU bodies may be of significant importance for a possible future judicial reform using artificial intelligence, especially as one of the sides of the argument was a discussion on the applicable standard of a 'court' within the EU and the Council of Europe. Therefore, at this point it is worthwhile to look at those aspects of the case, which relate specifically to this issue, if only because the Court of Justice of the EU has recalled against this backdrop its dialogue with the European Court of Human Rights and its previous case law on this matter, which creates the standard of a 'court' from an institutional and functional system perspective.

In explaining the background of the case, it must be mentioned that in the circumstances of the case that came before the CJEU, the European Commission initiated proceedings against Poland, the object of which was, inter alia, to challenge the guarantee of independence of the Disciplinary Chamber (*Izba Dyscyplinarna*) of the Supreme Court of Poland (*Sąd Najwyższy*), C-791/19.²⁵⁶ On 3 April 2019, the Commission sent a letter of formal notice to the Republic of Poland, stating that, by adopting new rules applicable to the disciplinary system for judges, the Republic of Poland had failed to fulfil its obligations under the second paragraph of Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU. The Member State responded in a letter dated 1 June 2019, denying any violation of EU law. On 17 July 2019, the Commission issued an opinion stating that the new disciplinary system introduced in this way violates the aforementioned

²⁵⁴ The amendment was introduced by: *ustawa z 8 grudnia 2017 r. o Sądzie Najwyższym*, Dziennik Ustaw 2018, item 5.

²⁵⁵ Laurent Pech, 'Protecting Polish Judges from Poland's Disciplinary "Star Chamber": Commission v. Poland (Interim Proceedings)' (2021) 58 Common Market Law Review 137; Luke Dimitrios Spieker, 'The Conflict over the Polish Disciplinary Regime for Judges - an Acid Test for Judicial Independence, Union Values and the Primacy of EU Law: Commission v. Poland' (2022) 59 Common Market Law Review 777.

²⁵⁶ *Court of Justice of the European Union: 15 July 2021, C-791/19, (n 185).*

provisions of EU law. Therefore, the institution called on the Republic of Poland to take the necessary measures to comply with this opinion within two months of its receipt. In its response dated 17 September 2019, the Member State considered the Commission's allegations to be unfounded. The dissatisfied European Commission decided to lodge a complaint with the CJEU.

In support of the application, the European Commission raised several pleas. In the context of the notion of a 'court', two of them are in particular relevant. First, the European Commission questioned the 'independence' of the Disciplinary Chamber. Secondly, it submitted that the Disciplinary Chamber did not meet the standard of a 'tribunal established by law'.²⁵⁷

Without going into detail, it should be noted that with regard to the first of these concepts, the CJEU, referring to its earlier position expressed, *inter alia*, in the case of *Asociația Forumul Judecătorilor din România*,²⁵⁸ pointed out that it follows from Article 2 TEU that the European Union is founded on values such as the rule of law, which are common to the Member States in a society where justice prevails.²⁵⁹ A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, *inter alia*, Article 19 TEU.²⁶⁰

As is provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights under EU law thus referred to in the second subparagraph of Article 19(1) TEU is a general principle of EU law stemming from the constitutional traditions

²⁵⁷ Andrzej Marian Świątkowski, 'Komisja przeciwko Polsce (Régime disciplinaire des juges). Głosa do wyroku TSUE z 15.07.2021 (Wielka Izba), sprawa C-791/19' (2024) 1 Kwartalnik Prawa Międzynarodowego 141.

²⁵⁸ *Court of Justice of the European Union: 7 September 2023, C-216/21 ECLI:EU:2023:628.*

²⁵⁹ Thomas von Danwitz, 'Normativa nacional sobre indicadores concretos en materia de reforma judicial y lucha contra la corrupción en el régimen de promoción de los jueces' (2023) 118 *La Ley Unión Europea* 1.

²⁶⁰ Magdalena Hilt, 'The Growing Role of Social Context as a Criterion of Judicial Independence' (2024) 8 *EU and comparative law issues and challenges series* 889.

common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, and which is now reaffirmed by Article 47 CFR.²⁶¹

Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection. In that regard, it should be borne in mind that although, as the Republic of Poland pointed out, the organisation of the judiciary in the Member States admittedly falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU.²⁶² To ensure that bodies which may be called upon to rule on questions concerning the application or interpretation of EU law are in a position to ensure such effective judicial protection, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 CFR, which refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy.²⁶³

It is settled case-law of the CJEU that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.²⁶⁴

On the second point, the CJEU, recalling its previous case law, including, *inter alia*, the judgment in joined cases C-585/18, C-624/18 and C-625/18,²⁶⁵

²⁶¹ *Court of Justice of the European Union*: 7 September 2023, C-216/21 (n 258); *Court of Justice of the European Union*: 20 April 2021, C-896/10, ECLI:EU:C:2021:311.

²⁶² *Court of Justice of the European Union*: 24 June 2019, C-619/18, ECLI:EU:C:2018:531; *Court of Justice of the European Union*: 5 November 2019, C-192/18, ECLI:EU:C:2019:924.

²⁶³ *Court of Justice of the European Union*: 7 September 2023, C-216/21 (n 258).

²⁶⁴ *Court of Justice of the European Union*: 20 April 2021, C-896/10, (n 261).

²⁶⁵ *Court of Justice of the European Union*: 19 November 2019, C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

indicated that a body does not constitute an independent tribunal, where the objective circumstances in which that body was created, the characteristics of that body, and the way in which its members have been appointed are capable of giving rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular, as to the direct or indirect influence of the legislature and the executive, and its neutrality with respect to the interests before it. Such doubts may therefore lead to that body's not being seen to be independent, which may undermine the trust that judiciary in a democratic society must inspire in individuals.²⁶⁶

The Court of Justice of the European Union has reiterated in this regard that the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. Verification of the requirement that a body, as composed, constitutes such a tribunal is necessary in particular for the trust which the courts in a democratic society must inspire in individuals.²⁶⁷ The CJEU also recalled that it is apparent from the case-law of the European Court of Human Rights that the expression 'established by law' in Article 6(1) ECHR concerns not only the legal basis for the very existence of the tribunal but also the composition of the bench in each case. The purpose of that expression is to prevent the organisation of the judicial system from being left to the discretion of the executive and to ensure that that matter is governed by a law. Nor, moreover, in codified law countries, can the organisation of the judicial system be left to the discretion of the judicial authorities, which does not, however, rule out conferring on them a certain power to interpret the relevant national legislation. Furthermore, the delegation of powers in matters relating to judicial organisation is acceptable in so far as that possibility falls within the framework of the national law of the state in question, including the relevant provisions of its constitution.²⁶⁸ Against such a background, the CJEU also recalled that as regards Article 6(1) ECHR, the European Court of Human Rights has held, *inter alia*, that the requirement

²⁶⁶ Mathieu Leloup, 'An Uncertain First Step in the Field of Judicial' (2020) 16 European Constitutional Law Review 145.

²⁶⁷ *Court of Justice of the European Union: 26 March 2022, Simpson v. Council and Review HG v. Commission (Réexamen), C-542/18 RX-II and C-543/18 RX-II* ECLI:EU:C:2020:232.

²⁶⁸ *European Court of Human Rights: 28 April 2009, Savino v. Italy*, App. No. 17214/05 and 42113/04.

that courts must be established by law means that the reassignment of a case to a court situated in another territorial jurisdiction cannot fall within the discretionary power of a particular body. The European Court of Human Rights considered, more specifically, that the fact that neither the reasons for which such reassignment may take place nor the criteria to be fulfilled in carrying out such reassignment have been specified in the applicable legislation is capable of creating a situation where the court thus designated is not seen to be independent and impartial and does not offer the degree of foreseeability and certainty required for such a court to be considered 'established by law'.²⁶⁹

With this in mind, the CJEU concluded that the relevant provisions of Polish law do not meet the requirements derived from the second subparagraph of Article 19(1) TEU. In doing so, it assessed the domestic provisions of national law by assessing the effect necessary to achieve the effect referred to by the provisions of European law.²⁷⁰

It follows that the current jurisprudence of the Court of Justice of the European Union distinguishes the term 'tribunal established by law' alongside the term 'independent court'. This concept has appeared in the jurisprudence of this body on a number of occasions, most recently, inter alia, in the judgment of 11 July 2024, joined cases C-554/21, C-622/21 and C-727/21²⁷¹ or in the judgment of 21 December 2023, case C-718/21²⁷², in which the CJEU developed its previous jurisprudence in the discussed aspect. The conclusions of the CJEU jurisprudence lead to the necessity to distinguish the standard of a 'tribunal established by law', which should in principle be characterised by the attribute of 'independence' in relation to other authorities.²⁷³ In doing so, the CJEU did not create a positive standard,

²⁶⁹ *European Court of Human Rights: 12 January 2016, Miracle Europe kft v. Hungary*, App. No. 57774/13.

²⁷⁰ Joelle Grogan, 'Joined Cases A. K. v. Krajowa Rada Sądownictwa (C-585/18) and CP (C-624/18), DO (C-625/18) v. Sąd Najwyższy (C.J.E.U.)' (2020) 59 *International Legal Materials* 459.

²⁷¹ *Court of Justice of the European Union: 11 July 2024, C-554/21, C-622/21 and C-727/21*, ECLI:EU:C:2024:594. Cf. Nika Baëië Selanec and Davor Petrië, 'New Frontiers for Article 19(1) TEU: A Comment on Joined Cases C-554/21, C-622/21 and C-727/21 Hann-Invest' (2024) 20 *Croatian Yearbook of European Law & Policy* 127.

²⁷² *Court of Justice of the European Union: 21 December 2023, C-718/21*, (n 186).

²⁷³ Cezary Mik, 'Notatka dotycząca kwestii, czy Wyrok Trybunału Sprawiedliwości Unii Europejskiej z dnia 21 grudnia 2023 r. w sprawie C-718/21 stanowi podstawę

but rather commented on the question of the independence of the courts of the Member States by examining various legal situations and determining which of the solutions evaluated did not fit into this concept.

It must be added that the standard of a ‘tribunal established by law’ was essentially created in the dialogue between the two European tribunals, it is tribunals that have established its significance in their case law. It should be mentioned that recent European Court of Human Rights and European Court of Justice judgments do indeed make it clear that the requirement to have courts established by law is autonomous from requirements of independence. Nevertheless, their case law tends to assume that it is not necessary to show that, in addition to the infringement of the requirement that courts and tribunals must be established by law, the court’s independence have been compromised in order to conclude that Article 6 ECHR or Article 47(2) CFR have been infringed.²⁷⁴ Today, the existence of these standards has, it may be thought, become a reality.

Exploring the idea of the administration of justice by the courts (on behalf of citizens), there is no doubt that its central element, the bedrock of attention, is the element of public trust in the courts. It is the criterion of a ‘tribunal established by law’ that seems to have the potential to constitute the basis of this trust. In turn, citizens’ trust can only truly be sought in a context in which the rule of law and a system of checks and balances between the different branches of government are ensured. As the doctrine emphasises, the requirement to have a tribunal established by law contains four key imperatives that are capable of upholding the principles underlying democracy: equality; quality; balance; and accountability. By preventing the creation of *ad hoc* tribunals, this requirement guarantees the equality of litigants before the law. It also requires a qualitative system for the recruitment of judges, reducing the risk of politicisation and ensuring their subordination to the law. Therefore, the principle of the rule of law is concretely reflected

prawną odmowy stosowania przez Marszałka Sejmu orzeczenia wydanego przez Izbę Kontroli Nadzwyczajnej i Spraw Publicznych Sądu Najwyższego’ (2024) 182-183 Przegląd Sejmowy 191.

²⁷⁴ Lorenzo Cecchetti, ‘Granting Rights, Preserving the Rule of Law? The Effectiveness of the Charter of Fundamental Rights’ in Cristina Fasone, Adriano Dirri and Ylenia Guerra (eds), *EU Rule of Law Procedures at the Test Bench. Managing Dissensus in the European Constitutional Landscape* (Palgrave Macmillan 2024) *passim*.

in Article 6(1) of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights and Article 19(1)(2) of the TEU.²⁷⁵

Moreover, the requirement that the tribunal be established by law also reinforces the requirements for institutional balance and accountability. While the institutional organisation of the various branches of government at the national level, as well as their interactions, are a matter of national sovereignty, the requirement to establish tribunals by law nevertheless imposes respect for a certain balance. Indeed, it primarily protects the independence of the judiciary by opposing disproportionate interference by the executive and legislature in its organisation. However, this requirement is broader than simply protecting judicial independence, because this also restricts the freedom of judges. Indeed, it requires judges to act within the limits of the powers granted to them. As the doctrine rightly points out, the requirement that tribunals must be established by law therefore represents an important potential for the protection of democracy. In addition to preventing disproportionate interference by the executive in the judiciary, it provides the basis for protecting a genuine balance between the different branches of government. As can therefore be thought, the recent revival of this requirement before the courts in Luxembourg and Strasbourg is therefore a step forward in protecting the rule of law and democracy in Europe.²⁷⁶

The right to a court of law in the above sense should be understood as a principle based on the assumption that the right of every individual is correlated with specific obligations on the part of public authorities, and in particular the legislator, at the national level, to secure this right in normative acts, taking into account the prohibition of exclusion of judicial remedy for the enforcement of infringed freedoms and rights. It also extends to shaping legal proceedings in a way that optimally guarantees everyone's right to have their case examined or to oblige all public authorities applying the law to respect the right of access to the courts, and in the course of legal proceedings, to create conditions in the proceedings for the case to be examined and for

²⁷⁵ Raphael Bossong and Leonie Kristina Trebeljahr, 'Handlungsfähigkeit der EU : Herausforderungen zu Beginn der neuen Legislaturperiode Rechtsstaatlichkeit als Grundlage der Handlungsfähigkeit der EU' (2024) 50 Stiftung Wissenschaft und Politik-Aktuell 1.

²⁷⁶ Cecilia Rizcallah and Victor Davio, 'The Requirement That Tribunals Be Established by Law : A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2022) 17 European Constitutional Law Review 581.

the active participation of its parties. This right to a court of law forms the basis for a claim to have a case examined by a court, and is universal in nature, meaning that it should apply to every citizen, without exception.²⁷⁷

The above, it may be thought, is an important framework for the operation of courts with the possible use of artificial intelligence in the future. Citizens' confidence in the administration of justice within the concept of an 'independent tribunal established by law' is a desirable goal and at the same time an effect that should be achieved if artificial intelligence is to become a part of the structure of independent courts in the justice system for real. Only a court that meets the criteria of 'independence' and 'established by law' discussed above will ever be a competent court.

At first glance, one might think that algorithmic (artificial) courts would not be susceptible to pressure from other branches of government, especially the executive. This is because artificial intelligence has the capacity to make decisions by analysing the vast amounts of data at its disposal without any external influence. However, when one looks at the way in which artificial intelligence develops, which is mainly in the private sector, a significant risk for judicial independence may be the influence coming from this environment, which manifests itself in the possibility to interfere with the algorithm. Since the structures of the state essentially have a monopoly on the administration of justice, a monopoly that derives from the people, it is necessary to develop solutions that allow for the control of technology with the participation of the state apparatus, which will have a transparent character and enable the public to build trust in the resulting technological courts. If society deems it appropriate to legitimise artificial intelligence for purposes previously reserved for traditional courts, it must be assumed that the concept of an 'independent tribunal established by law' will have to evolve in such a way as to clearly define the place of artificial intelligence in the administration of justice.²⁷⁸ At present, however, there is no clear guidance on artificial courts in EU and Council of Europe law, which means

²⁷⁷ Bostjan M Zupancic, 'Access to Court as a Human Right According to the European Convention of Human Rights' (2000) 9 Nottingham Law Journal 1.

²⁷⁸ Cf. Lydia Wolff, 'Der menschliche Richter und sein verfassungsrechtlicher Wert - Eine neue Perspektive algorithmischer Konkurrenz' in Philipp Reuß and Jessica Laß (eds), *Göttinger Kolloquien zur Digitalisierung des Zivilverfahrensrechts* (Universitätsverlag Göttingen 2024) 159-168.

that their place should be determined, inter alia, by reference to traditional standards.²⁷⁹

What this place should be and how far artificial intelligence could have an impact on the administration of justice is, however, a matter that requires further analysis in several areas. One of these is certainly the area referred to in constitutional law jurisprudence and literature as the area of the impartiality and independence of judges. So far, only judges with such qualities can be the only ones, according to the traditional view, who can form the composition of an independent tribunal established by law. It is this area that is now worth looking at.

2.3. Contemporary attributes of judges as a guarantee for the realisation of the right to a fair trial

The concept of independent tribunal established by law, according to the prevailing view, cannot exist (and certainly could not until not long ago when AI came along) without impartial and independent judges who form the bench.²⁸⁰ This is also the foundation of modern democracies, which has evolved into what is today referred to in most democratic countries as the basic guarantee for a fair judicial decision.²⁸¹ The basis for this principle was established in 1701 by the Act of Settlement enacted by the English Parliament.²⁸² It has introduced the judge's subordination to the law, ensured that his or her remuneration was fixed and limited his or her removal from office.²⁸³ Independence was linked to the need to create conditions for judges

²⁷⁹ Nóra Chronowski, Kinga Kálmán and Boldizsár Szentgáli-Tóth, 'Artificial Intelligence, Justice, and Certain Aspects of Right to a Fair Trial' (2021) 10 Acta Universitatis Sapientiae, Legal Studies 169.

²⁸⁰ AT Denning, 'The Independence and Impartiality of the Judges' (1954) 71 South African Law Journal 345.

²⁸¹ Theo Rasehorn, 'Unabhängige Richter oder Justizbürokraten?' (1970) 25 Juristen Zeitung 574; Luis María Díez-Picazo Giménez, 'Notas de Derecho comparado sobre la independencia judicial' (1992) 34 Revista Española de Derecho Constitucional 19; Uwe Berlit, 'Modernisierung der Justiz, richterliche Unabhängigkeit und RichterInnenbild' (1999) 32 Kritische Justiz 58; Ben Olbourne, 'Independence and Impartiality: International Standards for National Judges and Courts' (2003) 2 Law and Practice of International Courts and Tribunals 97.

²⁸² Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence' (2001) 1 Oxford University Commonwealth Law Journal 253.

²⁸³ Cf. Georg Vanberg, Benjamin Broman and Christopher Ritter, 'The Rise and Protection of Judicial Independence' in Mark Tushnet and Dmitry Kochenov

to adjudicate impartially, on the basis of the law, and free from any influence. This concept has become a systemic principle, the foundation of the right to a fair trial now implemented in every state under the rule of law.²⁸⁴ Today, it is undoubtedly one of the basic features of the judicial system, without which there can be no real independence of the courts. Judges in the administration of justice should be independent and impartial.²⁸⁵

It should therefore come as no surprise that this principle has been adopted in all democratic states. Typically, European constitutions contain a provision directly referring to this principle, followed by several other provisions guaranteeing it. For example, in Poland, the Constitution indicates in Article 178(1) that judges in the exercise of their office are independent and subject only to the Constitution and laws, to guarantee in other provisions their working conditions and remuneration corresponding to the dignity of their office (Article 178(2) of the Polish Constitution), indefinite appointment (Article 179 of the Polish Constitution), irremovability (Article 180(1) of the Polish Constitution) or immunity (Article 181 of the Polish Constitution).²⁸⁶ In Spanish law, Article 117(1) of the Spanish Constitution emphasises that judges are independent, irremovable, accountable and subject only to the law, only to then provide in subsequent provisions for a guarantee of their removal from the profession only on the grounds provided for by law (Article 117(2) of the Spanish Constitution), or to specify the necessity of the incompatibility of the functions of members of the judiciary with other functions (Article 127(2) of the Spanish Constitution).²⁸⁷ In both countries, political activities of judges are also directly prohibited (Article 178(3) of the Polish Constitution, Article 127(1) of the Spanish Constitution).²⁸⁸ In Germany, on the other hand, the relevant provision is contained in Article

(eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar 2023) 246-261.

²⁸⁴ Ian Langford, 'Fair Trial: The History of an Idea' (2009) 8 *Journal of Human Rights* 37.

²⁸⁵ Daniel Knaga, *Niezawisłość sędziowska jako konstytucyjna zasada wymiaru sprawiedliwości* (Wydawnictwo Naukowe FNCE 2024) 19 ff.

²⁸⁶ Beata Stępień-Załucka, 'Niezawisłość sądownictwa a niezależność sądów i niezawisłość sędziów' (2011) 85 *Przegląd Prawa i Administracji* 135.

²⁸⁷ Interestingly, the Spanish Constitution does not mention the 'impartiality' of the judge in any of its provisions. In this context, it is pointed out that the legislature there considered this to be such an obvious value that it did not need to mention it. See more extensively Antón (n 38) 644.

²⁸⁸ Molski (n 142) 23 ff.

97(1) of the German Basic Law, which implies that judges are independent and subject only to the law. According to Article 97(2) of the German Basic Law, judges appointed permanently to positions as their primary occupation may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiry of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary. In doing so, the German Basic Law does not prohibit the political activities of judges, and this is in principle normal in the constitutional practice of the country. The Federal Law of 8 September 1961 on the Status of Judges (*Deutsches Richtergesetz*) provides details in this respect.²⁸⁹

The requirement of judicial independence also derives from acts of international law. It is fundamentally expressed in Article 47 of the EU Charter of Fundamental Rights or Article 6(1) of the European Convention on Human Rights - through the right of everyone to have his or her case heard by an independent and impartial court previously established by law. National courts must therefore comply with the requirements of independence and impartiality arising from the content of this right.²⁹⁰

An important element of judicial independence is the solution developed in modern constitutionalism, from which it follows that judges are subject only to the law.²⁹¹ A judge must adjudicate on the basis of the constitution and an inferior law that has been established in accordance with the procedural and substantive requirements of the constitution. This exclusivity of the constitution and the law as the legal basis for adjudication is crucial for, among other things, the existence of a democratic state of law based on the will of the people, as well as for the democratic legitimacy of judicial decisions, the certainty of the law for citizens, the primacy of the legal system over other social subsystems, in particular politics.²⁹² The principle of

²⁸⁹ Wittreck, *Die Verwaltung der Dritten Gewalt* (n 104) passim.

²⁹⁰ Robert Grzeszczak and Michał Krajewski, '„Sąd” w świetle przepisów art. 47 KPP oraz art. 267 TFUE' (2014) 6 Europejski Przegląd Sądowy 4.

²⁹¹ R Zimmerman, 'Judges Shall Be Independent and Subject Only to the Law' (1985) 48 *Journal of Contemporary Roman-Dutch Law* 291.

²⁹² Bainczyk, *Wybrane aspekty statusu prawnego sędziów w RFN z perspektywy instytucji unijnych* (n 101) 88.

the democratic state of law present in modern constitutions is a directive of the legislator to introduce within the national legal orders such institutions, instruments and legal tools that will ensure effective legal protection.²⁹³

The doctrine of law exposes the subordination of judges exclusively to the law as an individual guarantee of the judge's freedom from any influence, direct or indirect, coming from other organs or organisational units of state power, but also within the court itself on the course of judicial proceedings. The need for such shaping of the status of a judge is at the core of the rule of law. For only independent judges can guarantee the right to effective legal protection.²⁹⁴

The doctrine of individual states has repeatedly addressed the issue of the independence and impartiality of judges. Attention has been drawn to a number of various elements (guarantees) necessary for the proper functioning of a person performing the function of a judge in the judicial system. Among other things, the issues of the need to provide guarantees regarding the position of a judge, as well as the existence procedural guarantees, have been raised.²⁹⁵

In the former case, it is a matter of safeguarding the judge from external pressures, which is supposed to allow the issuance of a ruling in accordance with the judge's internal conviction reflecting the law and the satisfaction of justice.²⁹⁶ Therefore, it is pointed out that material and formal guarantees of the judge's position should be established, including the judge's personality traits, high moral standards, high ethical standards, professional experience, and political culture among the material guarantees. Formal guarantees, on the other hand, include, *inter alia*, a specific mode of appointment,

²⁹³ Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale Law Journal 3094.

²⁹⁴ Eberhard Schmidt-Assmann and Wolfgang Schenk, 'Verwaltungsrecht. Zerwaltungsgerichtsordnung. Kommentar' in Friedrich Schoch and Jens-Peter Schneider (eds), *Verwaltungsrecht. Zerwaltungsgerichtsordnung. Kommentar* (CH Beck 2024) *passim*.

²⁹⁵ Katarzyna Filipek, 'Gwarancje niezawisłości sędziowskiej sędziów sądów powszechnych' (2006) 9 Studenckie Zeszyty Naukowe 7.

²⁹⁶ Mieczysław Oliwa, 'Niezwisłość sędziowska z perspektywy wyzwań współczesnej cywilizacji (zagadnienia wybrane)' (2013) 3 Studia z zakresu nauk prawnoustrojowych. Miscellanea 47.

the manner in which the position is vacated, inadmissibility of transfer, immunity, material status, incompatibility or apoliticality.²⁹⁷

In the case of guarantees of a procedural nature, these include, inter alia, the design of procedural rules in such a way as to ensure the secrecy of judicial deliberations, the collegiality of adjudication, the free assessment of evidence, the institution of a request for exclusion from the examination of a case or the openness (publicity) of court proceedings.²⁹⁸

Against this background, a distinction is sometimes made between the personal and substantive aspects of judicial independence. The personal aspect is primarily based on two constitutional guarantees: the non-disqualification of a judge's status and its non-transferability. A judge may neither be dismissed or removed from office, nor transferred to another position or retired. Measures of comparable effect are also prohibited.²⁹⁹ The substantive aspect, on the other hand, refers to the judge's subordination to the law and the prohibition of the judge from exercising legislative and executive powers.³⁰⁰ Only the judges can decide what the law is in relation to a specific dispute and no one else can 'interfere' by giving instructions or in any other way.

Independence therefore means creating a position for the judge to exercise his or her office in a manner consistent with his or her own conscience, without the possibility of any direct or indirect pressure. It is intended to be a guarantee that a judge, when making a decision, will be impartial, which is the essence of the right to a fair trial. In doctrine, it is sometimes noted that judicial independence as such is granted to the incumbent judge, but it is neither a personal right nor a privilege associated with his or her status as a judge. It guarantees the necessary, but functionally related, freedom to properly fulfil the judicial function from the perspective of the rule of law. The special status of judges is intended to serve the general interest, which is the proper exercise of judicial power.³⁰¹ The possibility of a permanent and structural capacity for independence and its protection is an essential

²⁹⁷ Garlicki (n 135) 406.

²⁹⁸ Stępień-Załucka, 'Niezawisłość sądownictwa a niezależność sądów i niezawisłość sędziów' (n 286) 137 ff.

²⁹⁹ Sachs (n 100) 1994.

³⁰⁰ Helge Sodan (n 89) *passim*.

³⁰¹ Christian Hillgruber, 'Art. 97' in Teodor Maunz and others (eds), *Grundgesetz. Kommentar* (CH Beck 2025) *passim*.

feature of the judge's impartiality.³⁰² Not only subjective impartiality but also objective impartiality is important in this regard.

In explaining these concepts, it should be recalled that subjective impartiality is linked to the attitude of the judge in a particular case. The judge should acquire the necessary distance from the case and its circumstances. Subjective impartiality means the absence of bias, prejudice and personal attitude. A prerequisite for impartiality is to minimise the influence of irrational factors such as prejudice, dislike, sympathy, anger, depression, joy or sadness. Impartiality of this kind implies not being guided by particular considerations in the assessment of some other subject, disapproved of in terms of the type of assessment to be made or the decision to be taken.³⁰³ As the European Court of Human Rights, among others, points out, impartiality is the absence of bias and prejudice.³⁰⁴ The assessment of subjective impartiality is related to the judge's personal conviction in a given case and the determination of whether he or she is in any way prejudiced against the case under examination. The subjective criterion thus refers to an assessment of the judge's personal views or interests in the case.³⁰⁵ From the point of view of the social role of the judge and the emphasis on the fairness of the judgements rendered, it is particularly important to understand impartiality as the expectation of each individual to be treated individually by the procedural authorities, thus ensuring the procedural equality of the parties in being able to convince the judge of their reasons.³⁰⁶

Objective impartiality, on the other hand, concerns the external perception of the administration of justice and should be externalised in such a way that an image of an impartial judge is formed in the public mind. It is the duty of the state to ensure the impartiality of adjudication by a court composed of impartial judges. Since subjective impartiality is

³⁰² Charles Gardner Geyh, 'The Dimensions of Judicial Impartiality' (2013) 65 Florida Law Review 493.

³⁰³ Zygmunt Tobor and Tomasz Pietrzykowski, 'Impartiality as a legal concept' in Zygmunt Tobor and Iwona Bogucka (eds), *Law and Values. Jubilee Book of Professor Józef Nowacki* (Wolters Kluwer 2003) 273.

³⁰⁴ *European Court of Human Rights: 1 October 1982, Piersack v. Belgium*, App. No. 8692/79.

³⁰⁵ *European Court of Human Rights: 21 January 2004, Kyprianou v. Cyprus*, App. No. 73797/01.

³⁰⁶ Jerzy Skorupka, 'The way criminal procedure is shaped as an element of the court's objective (external) impartiality' (2021) 7-8 *Palestra* 8, 12 ff.

sometimes difficult to grasp, it is necessary to relate impartiality also to objective elements, and to require that a judge's behaviour should not cause situations that could give rise to justified doubts about his or her impartiality.³⁰⁷ A judge should therefore avoid anything that might call his impartiality into question. In and out of his office, including in the area of political activity (where, as in Germany, it is permissible), he or she should behave in such a way that confidence in his or her attitude is not undermined. It is therefore not only important that a judge should rule impartially, but also that it should be apparent that he or she does so. This element, in turn, points to the need to maintain impartiality externally. It is therefore necessary to provide guarantees for the perception of the judge as impartial by other persons, i.e. the parties and participants in the proceedings and the public. The objective aspect of the judge's impartiality is in fact subject to assessment by an entity external to the judge, e.g. the parties to the proceedings, but also by the public or, more broadly, by the public familiar with the proceedings.³⁰⁸ Impartiality assessed through the prism of objective criteria refers to the determination of whether - irrespective of the personal situation of any member of the adjudicating panel - there are real facts that may raise doubts about his impartiality.³⁰⁹ There is a close link between objective impartiality and the establishment and maintenance of a democratic society's trust in the courts. Repeated references are made in the jurisprudence to the average reasonable observer of the trial to assess whether this standard is met.

Against this backdrop, the jurisprudence of the constitutional courts of the individual states should be noted, which is of considerable importance for the European *acquis* on the independence and impartiality of judges. In fact, these qualities are at the core of the current constitutional regulation of the judiciary, making it difficult to imagine moving away from them in the future, which does not mean, however, that these qualities will not evolve.³¹⁰

In this context, the Spanish Constitutional Court, against the backdrop of the provisions of the Spanish Constitution, noted, *inter alia*, that the independence of the judicial power vested in each judge in the exercise of his or her jurisdictional function means that, in exercising that function, the judge is exclusively subject to the rule of law, meaning that he or she has no

³⁰⁷ Agus Nurudin, 'Upholding the Impartiality of Judges in Judicial Systems' (2020) 6 Hasanuddin Law Review 80.

³⁰⁸ Knaga (n 285) *passim*.

³⁰⁹ *European Court of Human Rights: 1 October 1982, Piersack v. Belgium*, (n 304).

³¹⁰ Mendaña (n 66).

connection with the orders, instructions or directions of any other public authority, in particular the legislative and executive. Configured in this way, the principle of judicial independence is an integral part of a democratic state, and its recognition in Spain dates back to the Cadiz Constitution of 1812.³¹¹ Independence is therefore, according to the Spanish Constitutional Court, an inseparable attribute of the judicial function, because it means that judges and courts are not subordinate to any other public authority in the exercise of their jurisdictional functions, but are subject only to the 'rule of law', i.e. the law. This means that, in contrast to the legislative and executive powers, which legally have a wide margin for free political decision-making, judges and courts that are members of the judicial power cannot exercise their jurisdictional function according to political discretion or according to their free will, but must decide in accordance with the rule of law and an established system of legal sources.³¹² The German Federal Constitutional Court, on the other hand, in its judgment of 11 November 2021, pointed out, that the constitutional norm according to which judges are independent and subject only to the law is a guarantee of objective independence, which in essence means that judges are bound only by the law and are therefore free from instructions. The executive cannot exert any unavoidable influence on the independence of judges, which includes indirect, subtle and psychological influences. Any measure that constitutes direct or indirect instructions as to how a judge should act or make decisions in the future violates the judge's independence and the independence of the court. The objective independence of judges is intended to ensure that the courts rely solely on law and justice in their rulings.³¹³ Similarly, the jurisprudence of the Polish Constitutional Tribunal indicates, inter alia, that the judge's impartiality is an inalienable feature of the judiciary, and at the same time an attribute, with the loss of which a judge ceases to be qualified to perform his or her duties.³¹⁴

One of the most important areas concerning this issue is the area of the origin of judicial authority, which mainly concerns the selection methods for judicial positions. It must be unequivocally pointed out that in the law of the European states there is no single specific model (standard) for taking

³¹¹ *Tribunal Constitucional de España*: 12 March 2012, 37/2012, BOE-A-2012-5000.

³¹² *ibid.*

³¹³ *Bundesverfassungsgericht*: 11 November 2021, 2 BvR 1473/20 (2021) NJW 3717.

³¹⁴ *Trybunał Konstytucyjny*: 27 January 1999, K 1/98 (1999) OTK 1.

up judicial positions.³¹⁵ There are several paths of access to the judicial profession, with traditional constitutional law doctrine referring exclusively to the holding of judicial office by a human being. Various requirements are placed on those seeking judicial office. These undoubtedly include legal education and relevant legal knowledge, which is related to the completion of law studies and applications, obtaining degrees or practice in another legal profession.³¹⁶ Various bodies are involved in the process of appointing judges. There are models in which judicial councils play an important role. This is the case in Spain and Poland, where the *Consejo General del Poder Judicial* and the *Krajowa Rada Sądownictwa* hold public competitions for judicial vacancies and from their proposal the appointment to judicial office is made. In Germany, on the other hand, the system is differentiated and, depending on the type of court and *Länder*, the appointment is made with the participation of bodies similar to the judicial councils or with a strong participation of representatives of the executive (ministers of justice). In addition, practice is familiar with so-called 'probationary judges' or 'judges on probation', temporary office holders, as is the case, for example, in Germany (*Richter auf Probe*) or in Poland (*asesor*). Among others, such a judge in these systems can be considered unsuitable for the administration of justice (what may happen in the future based on the judges' evaluation) but still issues valid judgements (during the test period). All this raises significant doubts as to the infringement of the principles of independence and impartiality of such judges, if only through the possible influence of other branches of government on the judiciary. This system of selection is often contrasted in Europe with the election of judges by judges (co-option model), where judges have a decisive vote (if not the only one) in the selection of candidates for judicial positions.³¹⁷

The aforementioned dispute regarding the composition of the *Krajowa Rada Sądownictwa* has given impetus to several statements by the European Court of Human Rights and the Court of Justice of the EU, which had as their

³¹⁵ Lee Epstein, Jack Knight and Olga Shvetsova, 'Comparing Judicial Selection Systems' (2001) 10 William & Mary Bill of Rights Journal 6.

³¹⁶ Sebastián Linares, *La (i)legitimidad democrática del control judicial de las leyes* (Marcial Pons) 27 ff.

³¹⁷ Victor Eugene Flango and Craig R Ducat, 'What Difference Does Method of Judicial Selection Make' (1979) 5 Justice System Journal 25.

subject, *inter alia*, the question of a judge's independence and impartiality.³¹⁸ The jurisprudence in these cases has led to the interesting conclusion that also the procedure for the appointment of a judge can be relevant for the perception of his or her independence and impartiality. The judgment of the European Court of Human Rights of 12 March 2019, *Guðmundur Andri Ástráðsson v. Island*,³¹⁹ recognised for the first time that the concept of a 'court established by law' found in the European Convention on Human Rights (Article 6(1)) includes, *inter alia*, the process of appointment of judges within the national judicial system, following the adoption of views previously expressed in the EFTA Court's decision of 14 February 2017,³²⁰ and in the judgment of the European General Court (former Court of the First Instance of the EU) of 23 January 2018 in the case T-639/16 P.³²¹ These judgments addressed the problem of the composition of the court in a manner that ensures its independence and impartiality, where it was pointed out, *inter alia*, that maintaining judicial independence requires strict compliance with the relevant standards for the appointment of judges, as any other approach could lead to the erosion of public confidence in the court, thereby undermining the impression of its independence and impartiality.³²²

The peculiar novelty of this concept makes it possible to link the nomination procedure for judicial office with the independence of the judge and indirectly affects no longer only the judge, but also the candidate for that office.³²³ Therefore, a kind of gateway has been introduced into the law in Europe to assess the conduct of a candidate for judicial office before appointment, which may have a possible impact on his or her attitude

³¹⁸ Aleksandra Kušta-Rogatka, 'Prawo do sądu w świetle najnowszych orzecznictwa sądów europejskich' (2024) 2 Przegląd Konstytucyjny 77.

³¹⁹ *European Court of Human Rights: 1 December 2020, Guðmundur Andri Ástráðsson v. Island*, App. No. 26374/18.

³²⁰ *EFTA Court: 14 February 2017, E-21/16*.

³²¹ *European General Court: 23 January 2018, T-639/16 P*, ECLI:EU:T:2018:22.

³²² Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'Nomination des juges et «tribunal établi par la loi». Confirmation, évolution et révolution en marge de l'arrêt *Guðmundur Andri Ástráðsson c. Islande* de la Cour européenne des droits de l'homme' (2021) 140 *Journal des tribunaux* 573.

³²³ Mathieu Leloup, 'Guðmundur Andri Ástráðsson: The Right to a Tribunal Established by Law Expanded to the Appointment of Judges' *Strasbourg Observers* (18 December 2020).

after this appointment.³²⁴ Until now, it has been standard practice to assess a candidate's conduct - in the light of the attributes of independence and impartiality - rather during his or her period in office.³²⁵ After all, it is no secret that active politicians have often found their way into the judicial system (this is the case in Germany, for example, on an ongoing basis), so that assessing their independence and impartiality through the prism of their behaviour prior to holding office may be questionable.³²⁶

However, now - as a result of the CJEU jurisprudence based on the *Guðmundur Andri Ástráðsson* case - the concept has also penetrated EU law and is the subject of dilemmas for several EU Member States. In the judgment of 19 November 2019, *Krajowa Rada Sądownictwa*, joined cases C-585/18, C-624/18 and C-626/18,³²⁷ the CJEU held that the interpretation of the second paragraph of Article 47 CFR must provide a level of protection not lower than that under Article 6(1) ECHR creating an important link between Strasbourg and Luxembourg case law. On the other hand, in the judgment of 26 March 2020, C-543/18, *Simpson v. Council (Réexamen)*, it was accepted that the right 'to a court established by law' includes the process of appointment of judges.³²⁸ Therefore, it is now accepted in European jurisprudence that violations of national law that occurred at the stage of the initial appointment of a judge to serve on a particular court may constitute a violation of the right to a 'court established by law', and independence is to be measured, inter alia, by the manner in which a judge is appointed. This kind of theme appeared, for example, in the CJEU judgment of 6 October 2021, C-487/19,³²⁹ in which it was held that a decision of a national court

³²⁴ Fernando Álvarez Ossorio Micheo, 'Derecho al Derecho. Independencia judicial y exclusiva dependencia a la Ley' (2022) 70 Estudios de Deusto. Revista de Derecho Público 55.

³²⁵ Rafael Bustos Gisbert, *Independencia judicial e integración europea* (Tirant lo Blanch 2022) 177 ff.

³²⁶ Dagmara Pawełczyk-Woicka, 'Nowe Szaty Cesarza, czyli problem z "praworządnością" powołań sędziowskich od 2018 roku' (2023) SIs Consilium Iuridicum 227, 232 ff.

³²⁷ *Court of Justice of the European Union: 19 November 2019, C-585/18, C-624/18 and C-625/18*, (n 265).ECLI:EU:C:2019:982.

³²⁸ It is interesting to note that in the present case, the CJEU overturned the judgment of the Court of First Instance of 23 January 2018 in Case T-639/16 P, which referred to the EFTA Court's conception of the issue at hand. Cf. *Court of Justice of the European Union: 26 March 2022, Simpson v. Council and Review HG v. Commission (Réexamen)*, C-542/18 RX-II and C-543/18 RX-II (n 267).

³²⁹ *Court of Justice of the European Union: 6 October 2021, C-487/19*, ECLI:EU:C:2021:798.

may be deemed to be non-existent if the appointment of a judge was made in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned.³³⁰

The resolution of the preliminary questions submitted in 2020 by one of the German courts could have been interesting in this context. The Erfurt Regional Court (*Landgericht*) asked the Court of Justice of the EU, inter alia, whether it is an independent and impartial court within the meaning of Article 267 TFEU in conjunction with the Article 19(1) 3rd sentence TEU and the second paragraph of Article 47 CFR, raising doubts as to its dependence on the executive. This court pointed out that, in its view, the national constitutional provisions in Germany and Thuringia do not meet the requirements of independence and impartiality, inter alia from the executive, since in Thuringia - as in all other German Länder - the organisation and administration of courts is in the hands of the executive, which supervises the courts and manages them in terms of personnel and material resources, and, moreover, judges are appointed and promoted by ministers of justice. The court further stressed that Germany and Thuringia are characterised by numerous formal and informal relationships and personal interdependencies between the judiciary and the executive, which opens up the possibility for the executive to exert unacceptable influence on the judiciary.³³¹ The case was not heard by the CJEU for several years. Recognising this, the Erfurt Regional Court issued an order on 22 April 2024 supplementing its request of 15 June 2020 with further preliminary questions.³³² Although these questions did not concern doubts as to impartiality and independence, the German court argued that the judgment of 9 July 2020 in Case C-272/19 (*Land Hessen*),³³³ which, as might be assumed, was the source of inspiration for the questions referred for a preliminary ruling, did not address the issues raised,³³⁴ and in the meantime, the Court of Justice of the European Union and the European

³³⁰ Rafał Mańko and Przemysław Tacik, 'Sententia Non Existens: A New Remedy under EU Law?' (2022) 59 Common Market Law Review 1169.

³³¹ *Landgericht Erfurt: 15 June 2020, 8 O 1045/18* (2020) NJW 2432. The case was registered with the CJEU under reference number C-276/2020.

³³² *Landgericht Erfurt: 22 April 2024, 8 O 1045/18*, ECLI:DE:LGERFUR:2024:0422.8O1045.18.00.

³³³ Mathieu Leloup, 'Het arrest Land Hessen: opnieuw over het onafhankelijkheidsbegrip in de Europese rechtsorde Zaak C-272/19' (2020) 2 SEW: Tijdschrift voor Europees en economisch rech 71.

³³⁴ Rosi Posnik, 'Legal Considerations on the CJEU Judgement of 9 July 2020, C-272/19' (2021) 1 International Journal of Parliamentary Studies 154.

Court of Human Rights had emphasised and clarified their requirements regarding the rule of law and the independence of the judiciary.

The preliminary questions of the German court were the result, one might think, of the perception of significant institutional flaws in the system of judicial organisation in Germany, a voice in the discussion on the need to change German law, not more widely perceived by legislative bodies in Germany.³³⁵ What is particularly interesting about this case is the aftermath of the decision of the Court of Justice of the EU of 16 February 2017, C-503/15,³³⁶ where the Luxembourg tribunal interpreted the concept of a court within the meaning of Article 267 TFEU against the background of Spanish law, stating, *inter alia*, that the *Secretario Judicial* (Registrar) appearing in the Spanish judiciary model does not meet the criterion of independence in its external aspect, which requires the absence of an official hierarchy or subordination to any entity able to give orders or directions.³³⁷ It is the views expressed in this judgment that the German court refers to. However, the case will ultimately not be decided by the Court of Justice of the EU, as on 2 January 2025, the Erfurt Regional Court withdrew its request for a preliminary ruling,³³⁸ as a result of which the case was removed from the register of the Court of Justice of the EU by the order of the President of the Court.³³⁹ This means that, for the time being, the system for appointing judges in Germany will not be reconsidered by the CJEU.

The issue of the independence and impartiality of judges is therefore an area of considerable interest on a European scale, where individual

³³⁵ Michał Celiński, 'Independence of Courts and Judges in Germany and the Land of Thuringia in Light of the Case Law of the Court of Justice. Case Study - Analysis of the Reference for a Preliminary Ruling Brought by Landgericht Erfurt in the Case A.G.E. p. BAG (C-276/20)' (2023) 1 International Law Quarterly 55.

³³⁶ Pilar Concellón Fernández, 'Tribunal de Justicia de la Unión Europea - De nuevo sobre el concepto de órgano jurisdiccional a efectos del artículo 267 TFUE: los secretarios judiciales y el expediente de jura de cuentas. Comentario de la sentencia TJUE de 16 de febrero de 2017, C-503/' (2017) 21 Revista de Derecho Comunitario Europeo 709.

³³⁷ Miren Josune Pérez Estrada, 'Reflexiones sobre la función del letrado de la Administración de Justicia en el proceso a consecuencia de la STJUE de 16 de febrero de 2017, C-503/15' (2017) 43 Revista General de Derecho Procesal 1, *passim*.

³³⁸ *Landgericht Erfurt*: 2 January 2025, 8 O 1045/18, ECLI:DE:LGERFUR:2025:0102.8O1045.18.00.

³³⁹ *President of the Court of Justice of the European Union*: 29 January 2025, ECLI:EU:C:2025:104.

concepts are constantly being developed. In the progressive development, however, no positive standard can yet be seen, but rather the scope of the negative standard is being widened.³⁴⁰ The European Courts are increasingly evaluating the domestic solutions of the Member States by highlighting their deficiencies, and thus the doctrine of independence and impartiality in their jurisprudence is steadily developing, which has just resulted in the recently adopted concepts on the conduct of the individual before appointment to judicial office.³⁴¹

Against such a background, an instrument introduced into Polish law, which in the legislator's assumption is intended as a kind of remedy for the possible systemic defectiveness of judicial appointments involving the contested composition of the *Krajowa Rada Sądownictwa*, may prove interesting. As a result of the rulings of the European tribunals, by the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts³⁴² a procedure called the 'test of independence and impartiality' of a judge was introduced into the legal acts regulating the system of common courts, military courts, administrative courts and the Supreme Court itself in Poland.

The procedure is intended to allow an examination of a judge's fulfilment of the requirements of independence and impartiality, taking into account the circumstances surrounding his or her appointment and the judge's conduct after his or her appointment, if, in the circumstances of a particular case, doubts are raised as to a breach of the standard of independence or impartiality affecting the outcome of the case.³⁴³ The purpose of this institution is to provide litigants with procedural guarantees that there are no doubts about the impartiality and independence of the judge deciding the case.³⁴⁴

In practice, this instrument functions in such a way that, once court proceedings have been initiated, the court having jurisdiction over the case

³⁴⁰ Biltgen (n 239) 551 ff.

³⁴¹ Ugartemendía Eceizabarrena (n 250) 309 ff.

³⁴² *Ustawa z 9 czerwca 2022 r. o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw*, Dziennik Ustaw 2022, item 1259.

³⁴³ Janusz Roszkiewicz, 'Indywidualny test niezawisłości sędziego powołanego z naruszeniem prawa - uwagi na tle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Europejskiego Trybunału Praw Człowieka, Sądu Najwyższego i Naczelnego Sądu Administracyjnego' (2022) 11-12 *Przegląd Sądowy* 75.

³⁴⁴ Konrad Lipiński, 'Ustawowy test niezawisłości i bezstronności sędziego w sprawach karnych' (2022) 10 *Palestra* 33.

is obliged to notify the applicant, party or participant in the proceedings of the composition of the court deciding the case. Following the notification, the entitled person has the right to submit a motion for an examination of the judge's fulfilment of the requirements of independence and impartiality. The motion shall be submitted within a week from the date of notification to the entitled party about the composition of the court. After the expiry of this period, the right to make the motion shall lapse. The court shall thereby notify the person entitled to file a motion of its composition upon service of the first notice in the case and with each subsequent letter if the composition of the court has changed. This opens the way for the party to file the motion.³⁴⁵

In the context of a judge's independence and impartiality, three areas in particular may be assessed in a given case: (1) the circumstances surrounding the nomination proceedings concerning the judge in question; (2) the conduct of the judge after his or her appointment as a judge; (3) the possible impact of both of these circumstances on the outcome of the case in question, taking into account the circumstances of the eligible person and the nature of the case. It is through this instrument that the standard of independence or impartiality of the judge concerned is examined in this context. It is necessary to show how, in the circumstances of the particular case, a breach of the standard of independence and impartiality, related to the appointment to the office of judge and the judge's subsequent conduct, could affect the outcome of the case, taking into account the circumstances of the entitled person and the nature of the case.³⁴⁶

Cases concerning the new legal instrument, so far, are few in Poland. The case law of Polish courts indicates, among other things, that it is in the interest of the entire legal system, and directly in the interest of the judiciary, that the external perception, i.e. the perception of the public, should not be such that it creates a belief that the conditions for an objective resolution of a case by a court do not exist. It is also stressed that this type of instrument may be particularly useful in situations where the dispute before the court concerns the interests of an individual - a citizen or a conventional entity not connected to the state structure on the one hand and the interests of

³⁴⁵ Patrycja Zgardzińska, 'Test na niezależność sędziów orzekających w sprawach karnych na kanwie orzecznictwa SN oraz polskiego prawa' (2024) 20 Przegląd Prawniczy UW 129, 138 ff.

³⁴⁶ Jakub Grzegorz Firlus, 'Test niezawisłości i bezstronności sędziego sądu administracyjnego - aspekt procesowy' (2023) 5 Przegląd Sądowy 5.

the state on the other. In such cases, the basic function of the courts in the structure of a democratic state of law is actualised, where the courts - as public institutions characterised by institutional independence, consisting of independent judges and acting impartially - are the ultimate arbiter in disputes between the individual and the state. For in this area, there is always a clash between private and public interests. This makes the requirement of impartiality particularly important. Any doubts as to impartiality must be treated with the utmost seriousness, considered with particular care and taken into account in order to avoid creating grounds for the public to believe that doubts exist, in particular any favouring of one of the parties to the proceedings before the court that goes beyond the scope of the proper resolution of the case.³⁴⁷

It should be added that the independence and impartiality of judges is also linked to the issue of the disciplinary responsibility of judges, which is still evolving in the various European countries. This is an issue linked to the non-transferability and non-removability of judges, which - in view of the subject matter of the study - should only be mentioned.³⁴⁸

Moreover, in recent times - in the context of judicial independence - various other issues have been discussed in the public space which radiate into this area.³⁴⁹ These include, inter alia, considerations of working time, issues concerning the number of cases handled, annual statistical reports (including pending proceedings), performance appraisals, or the system of judicial promotion.³⁵⁰ In Poland and Germany, the public debate has been focused, inter alia, on the executive's access to court IT networks and the related influence on the formation of the court's composition by electronic selection, based on algorithms. All of them are extremely controversial in

³⁴⁷ Beata Stępień-Załucka, 'Independence and Impartiality Test of a Judge. New Legal Instrument' in Fábio da Silva Veiga and others (eds), *Estudos de direito, desenvolvimento e acesso à justiça*, vol 2 (Instituto Iberoamericano de Estudos Jurídicos, Unichristus 2024) 16-26.

³⁴⁸ Piotr Mikuli and Maciej Pach, 'Disciplinary Liability of Judges: The Polish Case' in Piotr Mikuli and Grzegorz Kuca (eds), *Accountability and the Law* (Routledge 2022) 63 ff.

³⁴⁹ Adinda Zahra Fathya, Rani Santika and Universitas Gadjah Mada, 'Judicial Independence and Political Influence in Modern Democracies' (2025) 3 *Journal of Law and Social Politic* 57.

³⁵⁰ Joe McIntyre, 'The Six Myths of Judicial Independence' (2025) 52 *University of Western Australia Law Review* 157.

nature, capable of directly or indirectly interfering with a judge's attitude, exerting a form of external pressure on him or her.³⁵¹

The guarantees of independence and impartiality of judges in the individual legal systems are concretised in ordinary laws. For example, according to § 4(1) of the *Deutsches Richtergesetz*, a judge may not perform legislative and executive tasks simultaneously. On the other hand, § 25 of the *Deutsches Richtergesetz*, reiterates the principle that a judge is independent and is subject only to the law.³⁵² The Polish Act of 27 July 2001 - *Prawo o ustroju sądów powszechnych* (Law on the system of common courts) - provides in detail the rules for the assumption of office, remuneration or retirement of a judge, indicating unequivocally that judicial tasks are performed by judges (Article 2 § 1).³⁵³ Similarly, in Spain, the *Ley Orgánica* 6/1985 of 1 July 1985³⁵⁴ specifies the indicated constitutional principles, stating, among other things, that justice comes from the people and is administered on behalf of the king by judges and officials who are members of the judiciary (Article 1). According to the regulation contained therein, they are independent, non-removable, accountable and subject only to the Constitution and the rule of law.³⁵⁵

It should also be noted that in the jurisprudence of the CJEU, when analysing the concept concerning the impartiality and independence of judges, a reference to the 'minds of individuals' can be noted in this context. As indicated in the doctrine, the issue is to examine whether the relevant legal solutions or practices of the Member States contain rules which would make it possible to exclude (or: raise), in the minds of individuals, justified doubts as to the independence of this body from external factors and, in particular, from direct or indirect influences of the legislature and the executive, and its neutrality with regard to the interests before it and thus lead to the manifestation (or: not manifestation) of signs of independence or

³⁵¹ Zbigniew Kwiatkowski, 'Wyznaczanie składu orzekającego w sprawach karnych' (2018) 2 *Problemy Prawa Karnego* 75.

³⁵² Patrick CR Terry, 'Judicial Independence in Germany within the European Context' (2020) 3 *Theoretical and Applied Law* 5.

³⁵³ Izabela Hajduk-Hawrylak, Bartłomiej Kolečki and Anna Wlekińska, *Prawo o ustroju sądów powszechnych. Komentarz* (CH Beck 2018).

³⁵⁴ *Ley Orgánica* 6/1985, de 1 de julio, del Poder Judicial, BOE-A-1985-12666.

³⁵⁵ Adolfo and Vargas (n 125).

impartiality. This could undermine (or sustain) the trust that the judiciary should inspire in individuals in a democratic society.³⁵⁶

It must also be recognised that independent decision-making - in at least some cases - can be influenced by society's constantly changing moral concepts. In civil law or criminal law, there are a number of general clauses, such as 'equity', 'principles of social co-existence', 'public policy', etc., which refer to some value system, forcing the decision-maker to be fair. The legal system must guarantee that judges have the personal and factual ability to assess all aspects of an individual case in an overall social context.³⁵⁷ In this respect, judges must be guaranteed freedom and interpretive sovereignty in assessing social behaviour. The judge in such cases should be inclined to look for answers in rules outside the system, trying to adapt them or link them into the general values of the legal system, contained in the fundamental principles and the undefined general clauses.³⁵⁸ This leads to considerations of the need to see the judge as an entity equipped with morality, capable of feeling emotions, which can be both an advantage and a disadvantage when deciding individual human cases.³⁵⁹ The results of the research - although inconclusive - show that the guidance of emotions by judges, although it seems inevitable and sometimes even necessary, can often lead to a flawed decision.³⁶⁰

As can therefore be seen from the above, independence is not only a necessary condition for a materially fair decision, but also limits disputes over jurisdiction, doubts and criticism of the interpretation of the law and thus makes it possible to achieve legal security in a contentious situation. In this way, it contributes significantly to the functioning and acceptance of the judiciary as part of the system of state power. The independence and subsequent impartiality of the judges - elevated to the status of constitutional principles - clearly also apply to the independence of the courts as organs of public authority, as it is only the specific combination of the organisational

³⁵⁶ Biernat (n 93) 18 ff.

³⁵⁷ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 25) 161.

³⁵⁸ Marek Safjan, *Wyzwania dla państwa prawa* (Wolters Kluwer 2007) 204.

³⁵⁹ Antonin Scalia, *Mullahs of the West: Judges as Moral Arbiters* (Ombudsman 2009) passim.

³⁶⁰ Teresa Chirkowska-Smolak and Marek Smolak, 'Oceny moralne w rozumowaniu sędziowskim' (2017) 79 *Ruch Prawniczy Ekonomiczny i Socjologiczny* 31; John Smillie, 'Who Wants Juristocracy?' (2006) 11 *Otago Law Review* 184.

as well as the personal component that creates an independent judiciary.³⁶¹ However, at present, in EU law and the law of the Council of Europe, as well as in the national constitutional laws of European states, there is no clear indication of artificial judges, which means that their place in the legal system should be established, inter alia, by reference to traditional standards.

The extent to which judicial independence must be constitutionally guaranteed in order to satisfy the specific nature of proper judicial activity and the purpose served by the guarantee of independence must be taken into account and must be relevant when assessing the ability of artificial intelligence to meet this standard in the context of this tool's suitability for dispute resolution (automated adjudication). *De facto* independence establishes the need for sufficient safeguards against any avoidable - even if only indirect - attempts by the executive and legislature to influence judicial decision-making in individual cases beyond the limits of the law and against unauthorised interference by other judicial authorities.³⁶² The question of subordination to the law, effective legal protection, safeguarding against various pressures, immovability or incompatibility with the performance of other tasks is a matter which, in the context of the possibilities of artificial intelligence - as may be anticipated - will have to be looked at again, taking into account technological progress.³⁶³

The same can be said of judicial impartiality and the constitutional basis for the guarantee of this attribute of the administration of justice. This guarantee of independent courts concerning the judges adjudicating in them must be considered and be relevant in the context of designing solutions in the administration of justice based on artificial intelligence. There is a need to eliminate the possibility of algorithmic interference allowing biases against parties to judicial proceedings, regardless of the reason.³⁶⁴ The objectivity of the judicial system is an important part of building trust in the judiciary.

³⁶¹ Linares (n 316) *passim*.

³⁶² Diana Dimitrova and Darina Dimitrova, 'Possibilities for the Use of Artificial Intelligence in the Activities of the Judiciary' in Isabelle Oprea and others (eds), *Adapting to Change Business Law Insight from Today's International Legal Landscape* (ADJURIS 2023) 246 ff.

³⁶³ Chronowski, Kálmán and Szentgáli-Tóth (n 279) 169 ff.

³⁶⁴ Adrian Zbiciak, 'Wybrane aspekty wykorzystywania nowoczesnych technologii w pracy sędziego orzekającego w sprawach karnych. Stan obecny i perspektywa na przyszłość' (2024) 63 Gdańskie Studia Prawnicze 22.

Furthermore, an important issue that cannot be forgotten in the area of the possible functioning of algorithmic judges is the area of interpretation of social behaviour, linked to the judge's morality.³⁶⁵ The interpretation of open terms, general clauses, including those relating to the everyday functioning of society is one of the important tasks of the modern judge. Each case is usually different from another (even very similar), so that its resolution should be characterised by some element of individualisation. After all, the interpretative directions adopted by judges may not only capture the development of values in society but may themselves become a driving force for such development.³⁶⁶ The attribution of such a competence to algorithms may be relevant to the development of society.³⁶⁷ The purpose of the guarantee of independence, which should also be considered as part of the system of separation of powers in the overall structure of the state, may mean in this context that the interpretation of complex jurisprudential issues should be left to independent human decision-makers on a case-by-case basis.

Whether and how the legal system should be sensitive to solutions using artificial intelligence - however, these are questions which it is still too early to answer. They must be preceded by considerations concerning, among other things, the essence of the individual's realisation of the right to a fair trial.

2.4. Exercise of the right to a fair trial by an individual

One of the elements of a democratic state under the rule of law is the requirement for a fair procedure to be followed in any decision affecting the rights and interests of individuals. Any individual who seeks judicial protection should have the right to do so,³⁶⁸ and the necessary elements of this right, which is now referred to as the right to a fair trial, have been shaped over the years. As indicated so far, the right to a fair trial is not only the right of access to an authority meeting certain characteristics that must

³⁶⁵ David Dyzenhaus, 'The Very Idea of a Judge' (2010) 60 *University of Toronto Law Journal* 61.

³⁶⁶ Pierre Nihoul, 'L'indépendance et l'impartialité du juge' (2011) 71 *Annales de Droit de Louvain* 201.

³⁶⁷ Sandra Pérez Domínguez, 'Attitudes and Perceptions Regarding Algorithmic Judicial Judgement: Barriers to Innovation in the Judicial System?' (2023) 39 *Revista de Internet, Derecho y Política* 1.

³⁶⁸ Rhode (n 209) *passim*.

be guaranteed by national orders, but also precisely the concrete possibility to turn to a court to request legal protection of a particular case. In this context, the scope of the right to a fair trial is determined by the concept of 'the case'. Generally - in this area - a broad understanding of this term is adopted, emphasising that the realisation of the guarantee of the right to a fair trial covers all situations, irrespective of the specific procedural regulations, in which the need to decide on the rights of a given subject arises.³⁶⁹

The doctrine of constitutional law has developed this concept over the years. This right includes not only the right to require the court to hear a case fairly, in accordance with procedural rules and principles, but also the right to require the state to construct a judicial procedure containing certain rules, principles and procedural rights of the parties so that the procedure is fair.³⁷⁰ The constitutional right to have a case heard in a fair judicial procedure is, in this sense, a concretisation of the general right to a fair procedure before public authorities.³⁷¹ According to the jurisprudence of the constitutional courts, the constitutional right to a court (fair trial) includes in particular: (1) the right to initiate court proceedings (right of access to court); (2) the right to an appropriately shaped court procedure in accordance with the principles of fairness, openness and two instances; (3) the right to obtain a binding decision (right to a court judgment).³⁷² A fair judicial procedure should provide the parties with procedural rights appropriate to the subject matter of the proceedings. For example, reference may be made to the views of the German Federal Court of Justice, which derived a general injunction against the background of the provisions of the German Constitution to respect the right to fair proceedings.³⁷³

The concept of the right to a fair trial is based on several pillars, each of which plays an important role in the context of a possible breach of the state's obligations towards the citizen. It is impossible to discuss all of these pillars, indeed there is no need to do so, if only from the point of view of the subject matter of this work. Wider attention will therefore be paid to

³⁶⁹ Daci (n 44) 95 ff.

³⁷⁰ Langford (n 284) 37 ff.

³⁷¹ Grossi (n 210) 158 ff.

³⁷² Beata Stępień-Załucka, *Wolności i prawa człowieka oraz obywatel w Konstytucji RP z dnia 2 kwietnia 1997 r. Zagadnienia wybrane* (Wydawnictwo Uniwersytetu Rzeszowskiego 2021) 107-113.

³⁷³ For a detailed discussion of this topic, see e.g. Piotr Czarny, 'Prawo do sądu w Niemczech' (2016) 31 *Przegląd Prawa Konstytucyjnego* 197.

only two elements of the individual's realisation of the right to a fair trial: the openness (publicity) of court proceedings and the lengthiness of court proceedings.

From the point of view of an individual's rights, one of the most important components of his or her right to a court (right to a fair trial) is the openness of court proceedings, today an obvious standard in civilised countries, guaranteed by constitutions (e.g. Article 19 and Article 103(1) of the German Basic Law, Article 24 of the Spanish Constitution, Article 45 of the Polish Constitution) and acts of international law (e.g. Article 6(1) ECHR, Article 47 CFR).³⁷⁴ The right to an open trial is linked to the right to a fair trial and includes, *inter alia*, the right to participate in the trial before the court, the right to inspect the files of the proceedings and the right to be informed of the judgment. The openness of the proceedings is intended, *inter alia*, to ensure the possibility of citizen control over the course of the judicial procedure. The principle of openness of court proceedings, which stems from constitutional and international regulations, is also reflected in specific norms concerning the system, jurisdiction and proceedings before individual courts. The openness of court proceedings has a number of functions, including, *inter alia*, a participatory function, a control function, a guarantee function or a legitimising function. The implementation of the principle of openness provides the citizens with a certain scope of participation in the exercise of judicial authority, allows for social control over the proper performance by the courts of the tasks entrusted to them in the field of justice, guarantees the protection of the rights of the individual with regard to the correctness and fairness of court proceedings, and finally influences the increase of the society's trust in the bodies of the judiciary and their authority.³⁷⁵

The essence of the right to participate in a court hearing is, *inter alia*, to ensure that a party has access to the courtroom and is given the opportunity to be heard (which is sometimes contested). However, a limitation of these rights is possible, especially if it is in the public interest. As a general rule, however, the standard of openness requires that a party be given the opportunity to present evidence in defence of his or her interests in person, to listen to witness statements and to ask questions of witnesses, both in

³⁷⁴ Anna Kościółek, *Zasada jawności w sądowym postępowaniu cywilnym* (Wolters Kluwer 2018) 131 ff.

³⁷⁵ *ibid.*

criminal and civil cases.³⁷⁶ The right to participate in person and to present an oral argument applies not only to hearings, but to some extent also to closed hearings, which are becoming increasingly common in national court procedures. However, this standard allows, within the limits set by national law, for a case to be heard without the parties being present. This may be the case in particular when, objectively speaking, an oral position adds nothing to the clarification of the case, e.g. when the jurisdiction of the court only covers the examination of the legality of the contested decision, and also when the jurisdiction is wider, but the facts have already been established beyond doubt and the party has had the opportunity to present its position in writing.³⁷⁷ On the latter issue, the constitutional courts of individual states, among others, have expressed their opinions more than once. As an example, one may point to the ruling of the Polish Constitutional Tribunal, which indicated, *inter alia*, that in determining the rules of procedure before public authorities, the legislator must strive to realise values that may be in conflict with each other. In a situation in which the simultaneous realisation of all these values to the full extent is not possible, it is necessary to carefully balance the conflicting goods. This applies, *inter alia*, to the openness of court proceedings, which may sometimes give way to procedural considerations specific to the hearing of a particular type of case.³⁷⁸ The legislator may therefore restrict the participation of the parties in certain procedural activities, but such restrictions should always have adequate justification. The assessment of specific statutory solutions from the point of view of the requirements of procedural justice should take into account the nature of the cases heard in the given proceedings.³⁷⁹

Not every court hearing has to implement the principle of openness.³⁸⁰ Deviations from the principle of openness with regard to the examination

³⁷⁶ *European Court of Human Rights: 25 February 1997, Findlay v. United Kingdom*, App. No. 22107/93; *European Court of Human Rights: 19 April 2007, Vilho Eskelinen and Others v. Finland*, App. No. 63235/00.

³⁷⁷ Maija Dahlberg, 'Increasing Openness of Court Proceedings? Comparative Study on Public Access to Court Documents of the European Courts' (2019) 132 *Tidsskrift for Rettsvitenskap* 307.

³⁷⁸ *Trybunał Konstytucyjny: 3 July 2007, SK 1/06 (2007) OTK-A 7*.

³⁷⁹ *Trybunał Konstytucyjny: 11 June 2002, SK 5/02 (2002) OTK-A 4*.

³⁸⁰ David Freeman Engstrom, 'Post COVID Courts' (2020) 68 *UCLA Law Review Discourse* 246.

of the merits of a case and the issuing of decisions do occur in practice.³⁸¹ However, the possibility of hearing cases and issuing decisions on the merits in closed session should be treated as an exception to the right to an public hearing. This problem has been analysed on several occasions by constitutional courts and international tribunals. In connection with these rulings, it should be recalled that the case law of the European Court of Human Rights allows, among other things, for the limitation of the openness of court proceedings when it is justified by the subject matter of the proceedings,³⁸² or the nature of the proceedings (e.g. when the personal appearance of the parties is not of great importance).³⁸³ The exclusion of openness must take place on the basis of the provisions of the law, respecting the essence of the right to a fair trial and the necessity of limiting openness. The reasons for exclusion of publicity include both public and private considerations. Exclusion of publicity must appear as a necessary condition for the preservation of the guarantee of public interest or important private interests.³⁸⁴

An important value of procedural justice is also the hearing of a case by a court within a reasonable time. In the course of the development of the law in this area, the so-called right to have a case examined without undue delay (right to be tried without undue delay)³⁸⁵ has also been created, which is included in the regulations establishing the right to a fair trial at the level of the constitution of individual states or acts of international law. The length of court proceedings is currently a major concern for the judiciary, with individual countries reporting significant increases in the length of these proceedings.³⁸⁶ An example of this is in Poland, where courts are currently only scheduling the first hearings in some cases for 2030 (five years from

³⁸¹ Judith Townend and Paul Magrath, 'Remote Trial and Error: How COVID-19 Changed Public Access to Court Proceedings' (2021) 13 *Journal of Media Law* 107.

³⁸² *European Court of Human Rights: 18 October 2006, Hermi v. Italy*, App. No. 18114/02.

³⁸³ *European Court of Human Rights: 22 February 1984, Sutter v. Switzerland*, App. No. 8209/78.

³⁸⁴ Cf. Nóra Chronowski and Bettina Bor, 'Resilience of the Judicial System in the Post-Covid Period: The Constitutionality of Virtual Court Hearings in the Light of the COVID-19 Pandemic' (2023) 64 *Hungarian Journal of Legal Studies* 413.

³⁸⁵ Krit Zeegers, *International Criminal Tribunals and Human Rights Law. Adherence and Contextualization* (TMC Asser Press 2016) 289-351.

³⁸⁶ János Bóka, "'To Delay Justice Is Injustice": A Comparative Analysis of (Un) Reasonable Delay' in Attila Badó (ed), *Fair Trial and Judicial Independence* (Springer 2013) 141-161.

now).³⁸⁷ Shortage of court staff and significant workload of judges (in some types of cases in some countries an increase of workload by even several hundred percent can be observed)³⁸⁸ often leads to violation of this standard, a situation in which the case of an individual demanding the realisation of his/her right to a fair trial is not examined within a reasonable time. The state authorities thus violate the right to access to justice, to receive a judicial decision. In turn, the efficiency of judicial proceedings is an important value, the determinants of which may be relevant for the assessment of the solutions based on artificial intelligence addressed in this book.

2.5. Summary

The observations made in this chapter underline the importance of constitutional and international solutions related to the organisation of the judiciary. According to the findings made, the minimum guarantees for the proper functioning of courts in the modern world boil down to the statement that everyone should have the right to a fair and public hearing, without undue delay, by a competent and independent court established by law and composed of independent and impartial judges. The guarantee of judicial independence is linked, *inter alia*, to the absence of attempts by authorities other than the judiciary to interfere in the administration of justice, while the guarantees of a judge's independence and impartiality are aimed primarily at protecting judges from professional and personal disadvantages, in order to ensure that they are comfortable with the administration of justice, confident that they are able to fulfil their duties.³⁸⁹ Independence has primarily the function of strengthening the status of judges, while impartiality is linked

³⁸⁷ Cf., e.g. the order of the *Sąd Rejonowy w Gdańsku*: 5 February 2025, I C 311/23 (the order setting the first hearing of the case for 19 November 2030).

³⁸⁸ For example, in Poland, already in 2017. District Court in Bydgoszcz, as it were, explaining the lengthiness of the court proceedings in the case, pointed out that in the last 2 years (2015-2017) there was an increase in the average workload of the judge by almost 400% for all categories of cases. Cf. the decision of the *Sąd Okręgowy w Bydgoszczy*: 21 March 2017, VIII S 1/17. In contrast, another Polish court, in analogous circumstances, indicated that more than 1 000 cases remain on the judge's docket. Cf. the decision of the *Sąd Okręgowy w Warszawie*: 21 June 2017, XXIII S 41/17.

³⁸⁹ Cservák (n 51) 204 ff.

to the confidence of the parties in the judge, with the belief that he or she will not favour one of the parties to a dispute.³⁹⁰

From the point of view of the involvement of artificial intelligence in the administration of justice, these are the initial elements, the paradigm from which it is possible to start any consideration of the suitability or functionality of artificial intelligence to assist the administration of justice, including the adjudication of cases. The provisions of Article 19(1) TEU or Article 47 CFR, as well as Article 6(1) ECHR, dictates in this regard the result and the requirements (the court is to be independent and established by law), and not about the methods of establishing a system of judicial legal protection. However, there are currently no provisions of constitutional rank that explicitly address these standards in the context of the possible administration of justice by artificial intelligence.

In order to move on to consider the involvement of artificial intelligence in the administration of justice, it is necessary to first take a closer look at the issue of the efficiency of judicial proceedings, because it seems that artificial intelligence is primarily intended as a remedy for this very issue.

³⁹⁰ Joe McIntyre, *The Judicial Function. Fundamental Principles of Contemporary Judging* (Springer 2019) 159-180.

Chapter 3. Efficiency of judicial proceedings. The right to access to justice as an essential condition for the proper functioning of the judiciary in a democratic state

3.1. General comments

The duration of judicial proceedings is one of the relevant criteria for assessing whether, in the circumstances of a given case, a party's right to be tried without undue delay has been violated. To define the characteristics of the proceedings related to their duration - in the doctrine and jurisprudence, as well as sometimes in the legislation, various terms are used. In the negative dimension, one speaks, *inter alia*, of lengthiness, slowness, protraction, resting or stagnation of court proceedings. At the same time, the notions of speed, efficiency, effectiveness or procedural economy are among the requirements imposed on proceedings. It is accepted that the efficiency of proceedings leading to examine a case without undue delay is an important value, an element of procedural justice, a component of the right to a fair trial, which seems obvious from the point of view of a citizen. The state should create such a mechanism for the functioning of courts so that they operate efficiently.³⁹¹

This efficiency of proceedings, in the colloquial sense, is usually measured by the length of court proceedings. Proceedings of short duration will be perceived as efficient, while proceedings of long duration will be perceived as lacking this quality.³⁹² In such a view, the efficiency of the

³⁹¹ Szymon Rożek, *Sprawność sądowego postępowania cywilnego na tle rozstrzygania spraw spadkowych* (CH Beck 2022) 11 ff.

³⁹² Kinga Flaga-Gieruszyńska, 'Szybkość, sprawność i efektywność postępowania cywilnego - zagadnienia podstawowe' (2017) 60 Zeszyty Naukowe KUL 5.

proceedings would be equivalent in meaning to speed.³⁹³ However, it does not seem appropriate to equate these concepts. Even proceedings of lengthy duration may be assessed as efficient if the actions of both the court and the parties analysed from the point of view of their timeliness and expediency prove to be correct. On the other hand, proceedings of short duration, analysed in a similar manner, may turn out not to meet this requirement. Undoubtedly, however, speed and efficiency of proceedings will be closely related. In principle, speed will be a function of efficiency, since the duration of the proceedings is a derivative of their efficiency.³⁹⁴ Efficient proceedings are generally characterised by the shortest possible duration. The parameter of speed of proceedings also sometimes appears as an element or condition of the efficiency of those proceedings.³⁹⁵

Although the parameter of time is objective and measurable and the determination of the duration of the proceedings is not difficult in principle, the speed (length or short duration) of the proceedings is subject to relativisation.³⁹⁶ It would of course be possible to rigidly prescribe the duration of the proceedings after which they are considered long, but this does not seem advisable or necessary, especially as the subject matter and nature of individual cases may differ significantly. The solutions already introduced that refer to resolving a case within a reasonable time frame, allow for a proper assessment of these parameters, taking into account the reality of the specific case.³⁹⁷

Undoubtedly, the duration of court proceedings depends on a number of factors.³⁹⁸ In general, the due speed of judicial proceedings depends equally on both the appropriate procedural solutions and the correct practice related to their implementation. Speed has to be perceived not only in terms of specific legislative objectives, but also in terms of the specific practice of courts, their organisation and systemic structure, and sometimes taking

³⁹³ Anna Machnikowska, 'Prawo do sądu a szybkość postępowania cywilnego' (2016) 35 *Gdańskie Studia Prawnicze* 281.

³⁹⁴ Rożek (n 391) 12 ff.

³⁹⁵ MA Friedrichs, 'Fast Track: A Panacea for a Delayed and Cluttered Court System' (1993) 1 *San Diego Justice Journal* 443.

³⁹⁶ Jessica Heldman, 'Court Delay and the Waiting Child' (2003) 40 *San Diego Law Review* 1002, 1006 ff.

³⁹⁷ Rożek (n 391) 14 ff.

³⁹⁸ Anna Machnikowska, 'Sprawność postępowania sądowego w kontekście etosu sędziowskiego' (2015) 33 *Gdańskie Studia Prawnicze* 237, 245 ff.

into account the mentality and habits of judges. The key to speeding up proceedings will be, on the one hand, the procedural framework and rules laid down in procedural law and, on the other hand, the way in which they are implemented depending on the level of judicial staff, the organisation of the courts, the resources available and the infrastructure.³⁹⁹

The efficiency of court proceedings - as one may think - is primarily related to the organisation of the proceedings. Efficient, and therefore well-organised, proceedings should be properly planned and executed.⁴⁰⁰ This value should stem from the fact that procedural authorities should promptly take the steps provided for in procedural rules, in the appropriate form, while respecting the rights of the parties, in order to conclude the proceedings as quickly as possible by issuing an appropriate decision. Consequently, the denial of the efficiency of the proceedings will result in protracted proceedings that last longer than is necessary to clarify the relevant facts and legal circumstances of the case.⁴⁰¹

The terms speed and efficiency fall within the concept of judicial effectiveness, presented in legal science primarily as its efficiency and effectiveness. The effectiveness of the protection afforded by the courts can be analysed from the point of view of the constitutional and systemic role of the courts, the position of the judge, the adequacy of court procedures or the formal guarantees of the judicial process, and it can also be examined from the point of view of the actual barriers to access to the courts.⁴⁰² Effective procedure involves proper access to the court, the verification of the parties' claims in legal proceedings before an independent court and the guarantee of the binding force of the decision made. It also encompasses the duration of the proceedings, recognising as an objective of the process not only the delivery of a decision that is appropriate, fair and in accordance with the law, but also the speedy delivery of this decision. An indispensable prerequisite

³⁹⁹ Pierre Coulange, 'Economie du judiciaire' (1994) 12 *Politiques et Management Public* 1.

⁴⁰⁰ José Antonio Callegari, 'Celeridad procesal y razonable duración del proceso' (2011) 5 *Derecho y Ciencias Sociales* 114.

⁴⁰¹ Jakelinne Correa Moreno, *La audiencia de formulación de imputación puesta en la balanza con el principio de celeridad* (Universidad Externado de Colombia 2019) 46 ff.

⁴⁰² Rožek (n 391) 14 ff.

for efficiency and the starting point for its assessment is the accuracy of the decision.⁴⁰³

It can therefore be assumed that the efficiency of the judicial proceedings refers to the ability of the judicial system to resolve cases in an efficient, fair and lawful manner. The aim is to ensure that judicial proceedings are conducted in a manner that minimises delays, enables judgments to be delivered quickly and guarantees that decisions are taken in accordance with the law. This efficiency can be measured, among other things, by the length of the proceedings, but also by the quality of court decisions and access to justice. High efficiency in judicial proceedings aims to ensure that citizens have their rights protected quickly and effectively.⁴⁰⁴

Efficient proceedings should therefore take place before a competent, independent court, be expeditious, preserve the necessary guarantees of the rights of the parties, and end in a just and lawful judgment, subject to prompt and effective enforcement. It is sometimes argued that this is the theoretical model of the perfect judicial proceedings to which the legal system should aspire.⁴⁰⁵

When looking at these theoretical considerations, one has to see that in society it is the inefficiency and especially the lengthiness of court proceedings that is seen as the greatest shortcoming of the justice system.⁴⁰⁶ The negative consequences of the lengthiness of court proceedings are judged to be obvious. In such a light, the efficiency of the proceedings is seen as an important value of the proceedings, which leads to the conclusion that optimal judicial proceedings should last as short as possible.⁴⁰⁷ However, in today's reality of judicial activity, there are a number of factors resulting in far-reaching deviations from this - one might say - ideal model. Therefore, methods are being sought to find a way out of the existing negative conditions in the functioning of the judiciary, to allow judicial protection to be extended to as many citizens and their cases as possible. For example, in Brazil, there

⁴⁰³ Flaga-Gieruszyńska (n 392) 6 ff.

⁴⁰⁴ Ulla Gläßer, Georgios Karamanidis and Bernadette Papawassiliou-Schreckenber, 'Mediationsgesetzgebung in Griechenland - Effektiver Rechtsschutz durch obligatorische Mediation?' (2018) 21 Zeitschrift für Konfliktmanagement 205.

⁴⁰⁵ Félix Huanca Ayaviri, 'Análisis económico y perspectivas para una política judicial eficiente' (1997) 1 Revista Ciencia y Cultura 120.

⁴⁰⁶ José Luis Rebollo Álvarez, *Proceso civil, economía y mercado* (Universidad de Oviedo 2023) 39 ff.

⁴⁰⁷ Bóka (n 386) 141 ff.

is a backlog of more than 100 million cases.⁴⁰⁸ Although the situation in European countries is much better, it is still standard to wait two years or more for a final decision on a case, not to mention the pathologies that are sometimes encountered, such as the case mentioned in Poland, where one of the courts set the date for the first court hearing five years after the claim was filed. Perhaps algorithmic (artificial) courts will be a remedy for this situation. To answer this question, it is necessary, however, to first trace what the main determinants of the lengthiness of court proceedings are, to indicate the negative consequences of such a situation and to consider whether the traditional methods known so far for improving efficiency may give the court proceedings an effective character. This will finally allow to consider whether a theoretical account of the functionalities of artificial intelligence can be one such method (to restore efficiency).

3.2. *Determinants of inefficiency in judicial proceedings*

The consideration of the threats to the efficiency of court proceedings must be preceded by the observation that it is difficult to find one universal cause, one specific threat that could affect this feature. Depending on local conditions, certain habits or the specific ethos of the performance of official functions, some factors which generally impede the efficient examination of court cases in other places may not have such a significant impact on this value in a particular situation.⁴⁰⁹ The problem of the need to ensure efficient judicial proceedings and to counteract such proceedings that are not efficient has been known in legal science for at least a few decades, and thus appeared in principle long before the rise of artificial intelligence, or even before its emergence. However, the problems of the judiciary decades ago are different from those of today. The factors causing public dissatisfaction with the functioning of the courts were also different. Indeed, already in the first half of the twentieth century, problems such as the politicisation of the judiciary, the low remuneration of judges, the non-uniformity of jurisprudence, but also human or institutional problems related to the examination of a large number of cases, the long duration of judicial proceedings or the failure of the courts to take up cases that have been referred to them but never examined were perceived to affect the efficiency of the judiciary.⁴¹⁰ Sometimes, the

⁴⁰⁸ McInerney (n 9) 21 ff.

⁴⁰⁹ Machnikowska (n 398) 242 ff.

⁴¹⁰ James Willard Hurst, 'The Functions of Courts in the United States, 1950-1980' (1980) 15 *Law & Society Review* 401, 436.

problem was the access to court itself, for example in relation to the financial position of persons who wanted their case to be heard by the court. Over the last few decades, several studies have been prepared which have examined the questions of judicial performance and efficiency.⁴¹¹ Most of the studies note the 'pathologies' of the judicial process that lead to inefficiency and diminished quality of decisions. A subset of these studies either suggests or critiques alternative prescriptions that might enhance efficiency.⁴¹² Artificial intelligence is also sometimes proposed as a kind of remedy for today's judicial shortcomings.⁴¹³

Various studies cite socio-economic conditions, court overload, staff shortages, poor organisation, bureaucracy, excessive formalisation of court procedures, insufficient digitalisation, growing complexity of cases, lack of adequate financial resources, but also, for example, obstruction of proceedings by the parties. These reasons may be external to the judicial process as well as internal. The organisation of the judiciary, after all, which is not directly related to the construction or course of court proceedings, may significantly affect its efficiency and, consequently, effectiveness. In turn, the very construction of the procedural rules may also constitute a significant obstacle to the judge's ability to act swiftly and efficiently. The trial model, resulting from its reliance on traditional assumptions, does not necessarily serve the efficiency of judicial proceedings, although it seems that it should.⁴¹⁴

⁴¹¹ Cf. Richard Posner, *The Federal Courts: Challenge and Reform* (Harvard University Press 1996) 53 ff; Virginia A Hettinger, Stefanie A Lindquist and Wendy L Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision-Making* (University of Virginia Press 2006) 28 ff; Robert K Christensen and John Szmer, 'Examining the Efficiency of the U.S. Courts of Appeals: Pathologies and Prescriptions' (2012) 32 *International Review of Law and Economics* 30.

⁴¹² Juan Enrique Vargas Viancos, 'Eficiencia en la justicia' (2005) 5 *Reforma Judicial: Revista Mexicana de Justicia* 455; Sebastián Rubiano-Goot Gómez and Cristian Felipe Torres Semanate, 'Sistema Judicial Y Eficiencia: Una Visión Desde El Modelo De Fallas' (2013) 10 *Revista Universitas Estudiantes Bogotá* (Colombia) 297; Ulrike Babusiaux, 'Richterliches Entscheidungsverhalten im Lichte von Rechtsdogmatik, Rechtssoziologie und ökonomischer Analyse des Rechts' in Dieter Schmidtchen and Stephan Weth (eds), *Der Effizienz auf der Spur* (Nomos 1999) passim.

⁴¹³ Cf. Weslei Gomes de Sousa and others, 'Artificial Intelligence and Speedy Trial in the Judiciary: Myth, Reality or Need? A Case Study in the Brazilian Supreme Court (STF)' (2022) 39 *Government Information Quarterly* 101660.

⁴¹⁴ Coulange (n 399) 15 ff.

Each of these reasons is worth analysing, bearing in mind that they are not the only factors contributing to the inefficiency of judicial proceedings. When analysing each of the potential causes negatively affecting judicial proceedings, it is necessary to bear in mind the multidimensionality of the judicial process, the current conditions of which go far beyond its theoretical aspects. After all, the judicial process is (at least traditionally) a human activity serving a specific purpose, and the traditional judge is, after all, also a human (yet).

The judiciary, despite its obvious specificity, independence and constitutional separation, does not function in isolation from social reality. Its functioning is influenced more or less indirectly by factors such as the strength of the economy, the wealth of society and the wealth of the state.⁴¹⁵ The legal culture of a society or its level of technological development may also be relevant. As pointed out in the doctrine, even the very structure of cases coming before the courts is to some extent a reflection of the social and economic processes taking place. Examples include the possible collapse of the economy, which generally results in an increased number of bankruptcy proceedings, or an increase in the unemployment rate, which results in labour law litigation.⁴¹⁶ Disputes over bank loans, for example, due to economic difficulties or unpredictable events resulting in significant changes in the purchasing power of money, can also be important.⁴¹⁷ One of the most serious European crises of this kind in recent years was (and still is from the point of view of the performance of the courts) the one concerning housing loans taken out some twenty years ago in Swiss francs in individual European countries.⁴¹⁸ At that time, Europeans were keen to get into debt in a currency that was foreign from the point of view of their nationality - Swiss francs - which guaranteed them more favourable repayment terms for their loan agreements than in the national currency. Moreover, with the same creditworthiness, there was the option of borrowing a larger sum than would have been allowed in the national currency. As a result of the actions of the

⁴¹⁵ MP Jain, 'Role of the Judiciary in a Democracy' (1979) 6 *Journal of Malaysian and Comparative Law* 239.

⁴¹⁶ Giuseppe Albanese and Marco M. Sorge, 'The Role of the Judiciary in the Public Decision-Making Process' (2012) 24 *Economics & Politics* 1.

⁴¹⁷ Richard S Kay, 'Judicial Policy Making and the Peculiar Function of the Law' (2008) 40 *Connecticut Law Review* 1261.

⁴¹⁸ Petra Rodik, 'The Impact of the Swiss Franc Loans Crisis on Croatian Households' in Serdar M Değirmencioğlu and Carl Walker (eds), *Social and Psychological Dimensions of Personal Debt and the Debt Industry* (Palgrave Macmillan) 61-83.

Swiss National Bank and the decision to liberalise the exchange rate of the Swiss franc, the exchange rate of the Swiss franc immediately increased (by up to approximately 150%), there was a large appreciation of this currency, which ultimately demolished the budget of many households and hit those repaying housing loans in this currency.⁴¹⁹ In Poland alone, in recent years, hundreds of thousands of cases concerning loans of this kind have been brought before the courts, which has led, inter alia, to a situation where in some courts, at a certain period of time, one in eight cases was of a different nature than a case concerning a Swiss franc loan.⁴²⁰ The indebtedness of EU citizens in relation to this type of loan also affected many other countries. It can be pointed out that, for example, in Austria in 2014, Swiss franc loans of the non-financial sector amounted to as much as 11.6% of gross domestic product, and in Hungary to 12.2%. The problem also affected, for example, Croatia or Greece, and to a lesser extent Germany and Spain. The economic crisis triggered an avalanche of court cases, which are still being resolved (at the end of 2024, more than 200 000 cases related to Swiss franc loans were pending in Polish courts, which accounted for a significant proportion of the total number of civil cases; according to data from the Ministry of Justice, for example, only about 35% of cases at the level of appellate courts were decided on time, i.e. without undue delay).⁴²¹

Against such a background, there is no doubt that the current situation in the courts in Poland is influenced by the already mentioned crisis around the system of appointing judges and the status of the *Krajowa Rada Sądownictwa*, due to which, for example, competitions for vacant positions of judges for common courts are currently suspended. An increase in the number of full-time positions, a different organisation of the examination of this type of cases (e.g. specialised departments in courts), the expansion of infrastructural or IT possibilities - these are the proposed remedies for

⁴¹⁹ Agnes Gagyi and Marek Mikuš, 'Introduction: Boom, Crisis and Politics of Swiss Franc Mortgages in Eastern Europe: Comparing Trajectories of Dependent Financialization of Housing' (2023) 7 City 560.

⁴²⁰ Mathias Sosnowski Krabbe, 'From Laissez-Faire Lending to the Marketization of Litigation: The Case of Swiss Franc Debtors in Poland' (2023) 27 City 618.

⁴²¹ Polish Ministry of Justice press release: *Działania Ministerstwa Sprawiedliwości w związku ze sprawami frankowymi*, 4 December 2024.

the existing situation,⁴²² which is sometimes even referred to as the collapse of the Polish judiciary.⁴²³

Indeed, it is clear - according to the views of the doctrine - that the provision of resources for the proper functioning of the judiciary, both in terms of staffing and infrastructure, can significantly affect the efficiency of the judiciary. The more prosperous the state is, the more resources are allocated to the judiciary, the greater chance the judiciary will function effectively.⁴²⁴

An important factor - according to many - is also the quality of substantive law. Thus, not only procedural rules, but also the legal basis on which individual cases are decided are already considered important factors shaping the efficiency of the judiciary.⁴²⁵ Inflation of the law, faulty construction of the legislation enacted by the legislator, failure to recognise the complexity of certain legislative solutions, are also the bane of today's judicial systems. Too rapid and excessive growth in the number of legal provisions most often leads to their chaos, as well as difficulties in the application of the law and lack of coherence in the legal system.⁴²⁶ When confronted with new social, technological or economic problems, states often create new laws very quickly, which continuously leads to an overabundance of legal norms, the emergence of laws in different institutions without proper coordination, which consequently means significant puzzles for judges, who may find it difficult to keep up with the constant changes.⁴²⁷ Inflation of the law makes the legal system increasingly complex and thus difficult to interpret, especially as hastily enacted laws can sometimes be imprecise. New regulations also often generate new cases, which - due to, among other things, the limited capacity of human perception - prolongs

⁴²² Aleksandra Nadolska, 'Skuteczność prawna ochrony tzw. „frankowiczów” w kontekście terminów przedawnienia' (2020) 26 *Finanse i Prawo Finansowe* 63.

⁴²³ Anna Begier and others, *Sprawiedliwość coraz dalej od obywatela* (Iustitia 2022) *passim*.

⁴²⁴ Manurut Lochav and Mahua Bhattacharjee, 'Factors Influencing the Efficiency of Judiciary - A Public Good Provision' (2018) 6 *Global Scientific Journal* 289.

⁴²⁵ Thomas O Main, 'The Procedural Foundation of Substantive Law' (2009) 87 *Washington University Law Review* 801.

⁴²⁶ Stanisław Kaźmierczyk, 'Jakość prawa w dyskursie teoretycznoprawnym' (2012) 5 *Studia z Nauk Społecznych* 125.

⁴²⁷ Wojciech Rogowski, 'Zasób i inflacja przepisów prawa w Polsce (z uwagami porównawczymi)' (2018) 1 *Głos Prawa. Przegląd Prawniczy Allerhanda* 13.

the time of proceedings, sometimes significantly. Legislative stability as an element of a country's socio-economic conditions is therefore an important factor in this area.⁴²⁸

Court overload (case overload), on the other hand, is a situation in which the number of cases coming before the courts exceeds their capacity, leading to longer proceedings, higher workloads for judges and lower judicial efficiency.⁴²⁹ This seems to be a serious problem in many countries. Excessive caseloads, lack of adequate staff, insufficient use of new technologies are some of the main sources of the current state of affairs. In some courts it takes several months to wait for a case to start being heard, let alone wait for a final decision of the proceedings, which can sometimes take years. The current situation in many countries indicates the need to take measures to relieve the courts.⁴³⁰ In particular, the problem of the increase in the number of cases coming before the courts seems to be a factor that legislators are unable to cope with. There is no doubt that not only economic crises, but also economic development and increasingly complex relationships lead to an increase in the number of court cases and thus lengthen the waiting time for the decision. This is related, for example, to the labour shortage in the courts, a situation where not only the number of judges, but also the number of support staff is insufficient in relation to the number of cases that come before the courts. Judges are able to handle a certain number of cases each year, and the current statistics of their activity show that sometimes they are heavily overstaffed anyway. For example, in Poland, at the lowest level of the judiciary, in district courts, judges on average examine around 900-1100 cases per year. The number of cases is constantly increasing, as is the time needed to process them in all instances.⁴³¹ This number still seems to be a heavy burden on the daily work and may raise public doubts about

⁴²⁸ Dace Šulmane, 'Legislative Inflation - An Analysis of the Phenomenon in Contemporary Legal Discourse' (2011) 4 *Baltic Journal of Law & Politics* 78.

⁴²⁹ Marco de Benito, 'Back in Focus: Case Overload and Case Selection Standards in the Spanish Supreme Court' in Pablo Bravo-Hurtado and Cornelis Hendrik van Rhee (eds), *Supreme Courts Under Pressure. Controlling Caseload in the Administration of Civil Justice* (Springer 2021) 49-71.

⁴³⁰ Philip Langbroek, 'Financing the Judiciary in the Netherlands: Between Work Overload in the Courts and Government Control of the Judicial Budget' (2019) 10 *International Journal for Court Administration* 1.

⁴³¹ Cf. The EU Justice Scoreboard 2024, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024DC0950&qid=1718632412750>> accessed 30 March 2025.

the fairness and correctness of the decisions made. Such doubts should be avoided.

The excessive jurisdiction of the courts is also indicated as one of the possible negative factors affecting the efficiency of court proceedings. The increase in the number of cases referred to the courts is undeniable and overwhelming, and one of the reasons for this is the continuous expansion of the jurisdiction of the courts and the categories of cases subject to judicial review. Various legal provisions recently adopted in different countries give rise to new types of court cases arising from diverse and increasingly varied relationships. The increase in the number of cases is not accompanied by an increase in the number of judges, which has remained at a similar level for a long time - in individual countries. In addition to the expanding jurisdiction of the courts, more and more proceedings involve complex legal issues, determined by the current nature of, among other things, economic relations. As a result of the combination of these factors, and because of workload, court proceedings are not always efficient.⁴³²

Inadequate organisation of the judiciary, sometimes manifesting itself in a small number of court units, poor working conditions for judges (e.g. difficulties with premises), or poor availability of support staff (paraprofessionals) are also phenomena that can significantly slow down the work of judges and courts. This is because, on many occasions, judges have to perform clerical tasks instead of concentrating on adjudication. It is also sometimes a problem, in some countries, to have a sufficient number of courtrooms, especially those equipped with new technologies and allowing nowadays for remote hearings.⁴³³ Due to the design of court procedures, court proceedings are still largely open to the public, with parties and media. Too few courtrooms, on the other hand, can effectively paralyse court operations. As an example, a reinforcement of judicial staffing in a particular court due to an increased caseload will prove ineffective if additional judges are not available to use the courtrooms. It is also necessary to provide the judges with appropriate working conditions so that they can carry out their perijudicial work (e.g. writing reasons and reading files) in the court building. It is not possible for the conceptual work of writing a statement of reasons or concentrating on reading the case file to be carried out by a judge in

⁴³² Callegari (n 400) 114 ff.

⁴³³ Jacek Sobczak, 'Przewlekłość postępowania rzeczywisty problem organizacyjny, prawny, społeczny, polityczny czy urojenie' in Olga Piaskowska and Piotr Piesiewicz (eds), *Przewlekłość postępowania sądowego* (Wolters Kluwer 2018) 58.

a room where other people besides him or her are working, what sometimes happens.⁴³⁴ There are usually no legal provisions in individual countries that explicitly state whether judges should have individual offices (there are no such provisions in Poland, Germany or Spain, for example), so that, especially in small courts, judges share offices, which has an impact on their comfort and efficiency in performing their duties.⁴³⁵ In practice, the organisation of the judges' office space depends on many factors, including the size of the court and its budget or local conditions.

Also questionable at times are certain court procedures that make court proceedings significantly longer. For example, the wording of the rules on the justification of judgments or the reading of passages from the file, including the grounds for judgments. The increasing complexity of individual cases often significantly slows down the administration of justice. An example of this is one of the most important financial scandals in Poland in recent years, which was finalised in criminal proceedings, where the justification of the first instance court's judgment is 9345 pages long and was drafted over a period of approximately nine months.⁴³⁶ Then, due to the wording of the criminal procedure at the time (Article 418 of the Polish Code of Criminal Procedure), the judge had to read out the judgment in the courtroom, which also took a very long time. In the doctrine, it was pointed out in this connection, among other things, that, while citizens have the right to be informed about the content of the judgement, this information should be comprehensible to them and should not be a verbose speech uttered for several hours by the judge. Reading the verdict in this way turns the courtroom into a farce. For this reason alone, such situations may ridicule the court and the judiciary. This is because, according to that view, the judge has turned 'into a robot to read out the verdict, and there are computer programs to read the text out automatically'.⁴³⁷

⁴³⁴ *ibid* 58 ff.

⁴³⁵ Ricardo Augusto Ferreira e Silva, Tomas de Aquino Guimaraes and Marcos de Moraes Sousa, 'What Judges Think about the Meaning of Their Work' (2019) 10 *International Journal for Court Administration* 59.

⁴³⁶ Cf. Natalia Grzybowska, 'Jest uzasadnienie wyroku ws. Amber Gold. Liczy 9345 stron i zajmie około 47 tomów akt sprawy' *Gdańsk Nasze Miasto* (29 July 2020) <<https://gdansk.naszemiesto.pl/jest-uzasadnienie-wyroku-ws-amber-gold-liczy-9345-stron-i-ar/c1-7827784>> accessed 30 March 2025.

⁴³⁷ Cf. Paweł Czarnecki 'Poczytaj mi Pani sędzio... wyrok na dobranoc' (24 May 2019) <<https://karne24.com/poczytaj-mi-pani-sedzio-wyrok-na-dobranoc/>> accessed 30 March 2025.

The traditional method of recording court proceedings, which consisted of a detailed written record of all the actions taken, can be compared to this. In practice, it was usually based on the presiding judge dictating the content of the record, which significantly prolonged the proceedings. Introduction of the possibility of recording with audio or audio-visual equipment during a trial, which is gradually being introduced in individual countries, has a number of undoubted advantages over the traditional preservation and not only eliminates the problem of prolonging the trial caused by the dictation of the minutes to the court reporter, but also relieves the burden on the judge, who can focus exclusively on the merits and, last but not least, ensures the correct reflection of the actions carried out during the trial.⁴³⁸

In general, many amendments to procedural rules have been justified in practice, in recent years, by the need to improve court proceedings. The legislators have repeatedly justified themselves by the need to create conditions for faster handling of cases in court proceedings. For example, continuing with the discussion of solutions known in Poland, it can be pointed out that in the opinion of the legislator who introduced the relevant changes, it is to be considered obvious that the tendency to make the examination of cases before the courts more dynamic must not take place at the expense of the procedural guarantees of the parties. However, this did not prevent Polish legislator from introducing, in criminal proceedings, solutions limiting the principle of directness in the main proceedings and granting the court competence to decide which evidence should be examined directly in the proceedings and in relation to which it is sufficient to disclose the content of the transcript of an earlier examination. More recently, the then existing necessity for the court to list at the hearing all documents which are admitted into evidence without being read out was considered a completely unnecessary formalism. It is to be sufficient that they are regarded as evidence disclosed at the trial by operation of law. Another idea was the introduction of official forms for the justification of judgments. It was noticed that in practice, justifications for judgements are very voluminous, amounting to dozens or even hundreds of pages, and their preparation takes a lot of time for judges. Furthermore, when a judge is dealing with several cases at the same time and receives numerous requests for written statements of justification for judgments,

⁴³⁸ Anis Shuhaiza Salleh, Ani Munirah Mohamad and Mohd Zakhiri Nor, 'Legal Impacts of the Court Recording and Transcription (CRT) System at the Malaysian Courts' (2020) 7 *Journal of Critical Review* 1602.

the accumulation of work causes delays in proceedings, sometimes lasting several weeks. The forms were intended to solve these problems.⁴³⁹

In the context of civil proceedings, improvements, simplifications and acceleration of court proceedings were announced several years ago, introducing changes that were intended to respond to public expectations. In addition to recording hearings, a rule has been introduced whereby judges are not required to announce their verdicts at hearings where no one is present (which was previously the norm), and a simplified model for drafting justifications for judgements has been adopted. The acceleration of civil proceedings was also to be achieved, among other things, by extending the possibility to give evidence in writing, which mainly concerns the parties to the proceedings and witnesses who cannot come to the hearing, e.g. due to their stay abroad.⁴⁴⁰ However, the effect was rather to continue to look for measures to optimise the course of court proceedings, which in principle is not surprising, since of all the approximately three hundred and fifty changes to civil procedure in Poland made in the almost 60 years since the procedural law came into force, the vast majority were justified, *inter alia*, in this way: judicial proceedings are expected to speed up. However, the assumption that procedural reforms could speed up judicial proceedings was also present in other countries.⁴⁴¹

Without assessing the impact of these changes on the right to a fair trial, there is no doubt that these changes have, in practice, accelerated court proceedings, at least to some extent. Looking at these changes, one may get the impression that for some time now there has been a tendency to accelerate court proceedings and to allow this to happen at the expense of the parties to the proceedings. Legislators are looking for various means to streamline the judicial proceedings, to increase its efficiency, which seems

⁴³⁹ Cf. *Uzasadnienie projektu ustawy z dnia 19 lipca 2019 r. o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw*, Sejm (VIII), Druk Sejmowy nr 3134 (Explanatory Memorandum to the Bill of 19 July 2019 amending the Act - Code of Criminal Procedure and certain other acts).

⁴⁴⁰ The project assumptions are presented, *inter alia*, by Marcin Dziurda, 'Dowód z zeznań świadka na piśmie' (2019) 11-12 *Palestra* 103.

⁴⁴¹ Florence Kondylis and Mattea Stein, 'The Speed of Justice' (2023) 105 *Review of Economics and Statistics* 596.

to be an overriding value in relation to other conceivable guarantees of the right to a fair trial.⁴⁴²

Important changes in judicial proceedings that have taken place in many countries are related to the digitalisation of these proceedings. During the Covid-19 pandemic, it became apparent that the traditional functioning of many public authorities, including the courts, was not possible.⁴⁴³ Following the introduction of pandemic restrictions, courts dismissed cases *en masse*, the main reason being the need for the parties to appear in person at court buildings.⁴⁴⁴ Although the digitalisation of judicial proceedings was well-known by the time of the pandemic, nothing accelerated it like the events of mass isolation due to the pandemic.⁴⁴⁵ National justice IT systems, their functionality and widespread use are also an important factor in the efficiency of judicial proceedings, perhaps even one of the most important. Such a system, in order to function comprehensively, must allow all the formalities of court proceedings to be carried out, from the filing of a case to obtaining the reasons for the judgment.⁴⁴⁶ The potential of information systems is untapped in many countries. Perhaps this picture will be changed by Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation,⁴⁴⁷ which is applicable from 1 May 2025, although it does not refer to artificial intelligence systems directly.⁴⁴⁸

⁴⁴² Nika Tskhvarashvili, 'The Forms of Acceleration of Justice' (2024) 31 Law & World 222.

⁴⁴³ David Matyas, Peter Wills and Barry Dewitt, 'Imagining Resilient Courts: From COVID-19 to the Future of Canada's Court System' (2022) 48 Canadian Public Policy 186.

⁴⁴⁴ Ms Deepti Meena and Abhishek Baplawat, 'Covid 19 And Judicial System - From A Pragmatic to Modern Approach' (2022) 13 Journal of Pharmaceutical Negative Results 1079.

⁴⁴⁵ Chronowski and Bor (n 384) 413 ff.

⁴⁴⁶ Engstrom (n 380).

⁴⁴⁷ Document 32023R2844.

⁴⁴⁸ Jacek Gołaczyński (ed), *Cyfryzacja współpracy sądowej i dostępu do wymiaru sprawiedliwości w sprawach cywilnych, handlowych i karnych o charakterze transgranicznym. Komentarz* (Wolters Kluwer 2025) *passim*.

One of the necessary functionalities of the IT system, one would think, should be the handling of digitised files. This minimises the time and inconvenience of handling files in traditional form. Spain, for example, has such a system (*LexNet*), which is used, among other things, for the digital circulation of documents in the operation of the judiciary, using electronic signatures.⁴⁴⁹ Different systems for the circulation of legal documents have evolved in Spain, depending on the autonomous region. Until 2015, the system caused some problems, precisely because of the heterogeneity of the software throughout the country. In 2015, it was possible to ensure the compatibility of the systems, the systems were unified, and now the software communicates with each other. The main objective of the system is to ensure that citizens and judicial staff can complete all formalities before the judiciary electronically. Since 1 January 2016, professional attorneys and all judicial authorities have been obliged to use existing electronic systems for the presentation of pleadings and documents, as well as for communication (judgments, notices, summonses for personal appearance).⁴⁵⁰ In contrast, in Germany, for example, the use of Internet communication in the German justice system is taking place gradually. The transition to electronic form, as mandatory, is to take place from 1 January 2026.⁴⁵¹ In Poland, on the other hand, it is only from 2024 that attorneys can use electronic communication with the courts, and from 2025 there has been an obligation to designate a box for electronic service.⁴⁵²

Digitalisation is certainly a complex process, progressing in stages, and its incomplete implementation has so far effectively slowed down court proceedings more than once. Therefore, in 2025 (recently), a problem team under the Ministry of Justice, consisting of various experts, was established in Poland for the digitalisation of civil proceedings (interestingly, this work is supposed to concern only this type of proceedings). Among other things, the team is to determine what solutions should be enacted as part of the further computerisation of the Polish justice system. The next step is to propose

⁴⁴⁹ Alejandro Platero Alcón, 'Lexnet como máximo exponente del sistema de justicia electrónica en España: especial referencia a su tratamiento de datos personales' (2020) 152 *Revista de Ciencias Jurídicas* 13.

⁴⁵⁰ María Concepción Rayón Ballesteros, 'La modernización del proceso civil con el sistema Lexnet' (2017) 50 *Anuario Jurídico y Económico Escurialense* 119.

⁴⁵¹ Cf. <<https://www.bundesregierung.de/breg-de/bundesregierung/gesetzesvorhaben/digitalisierung-der-justiz-2263608>> accessed 30 March 2025.

⁴⁵² Rafał Cygan, 'Sądownictwo w dobie nowoczesnych technologii' (2025) 1 *Palestra* 241.

legal and technological solutions that take into account the current state of technological development. In the public discussion, among other things, doubts arose as to whether this means that Poland stands 'at the threshold of the era of (ro)bot judges.'⁴⁵³

Therefore, it can be assumed that public authorities - not only in Poland - see the need to further explore the area of new technologies also for the purpose of increasing the efficiency of court proceedings, which cannot come as a surprise. The insufficient use of technological possibilities is in fact one of the factors which influences the evaluation of the current regulations. The legislator should favour solutions which can increase the efficiency of the courts' work and thus increase the citizens' trust in the judiciary.

It should also be noted that factors affecting the course of the trial may also be the actions of the parties themselves, constituting a type of obstruction of the trial. It is often possible to encounter in practice behaviours of the parties and their attorneys, which consist in deliberate use of procedural rights in order to prevent the course of the trial or to slow it down.⁴⁵⁴ Therefore, for some time, legislators have also been considering and introducing solutions to counteract such behaviour, which may consist, inter alia, in judicial control of intentional obstruction of court proceedings.

As an example of this, one can cite a case brought before the German courts more than thirty years ago, where, in the course of ongoing proceedings, the defendant repeatedly made requests for evidence, with which he was deemed to have violated his procedural rights. Commenting on this judgement, local academics clearly stated that the court must be able to react in such a situation. The court procedure must be shaped in such a way as to be able to combat procedural obstruction.⁴⁵⁵ Therefore, in the German Supreme Court (*Bundesgerichtshof* - BGH) judgment of 7 November 1991,⁴⁵⁶ it was adopted that if the accused makes excessive use of

⁴⁵³ Piotr Szymaniak, 'Cyfryzacja postępowań cywilnych. Komisja kodyfikacyjna wyznaczy kierunki' (Warszawa, 20 January 2025) <<https://www.rp.pl/sady-i-trybunaly/art41698791-cyfryzacja-postepowan-cywilnych-komisja-kodyfikacyjna-wyznaczy-kierunki>>.

⁴⁵⁴ Ellen S Podgor, 'Obstruction of Justice: Redesigning the Shortcu' (2020) 46 Brigham Young University Law Review 657.

⁴⁵⁵ Tarek Abdallah, *Die Problematik des Rechtsmissbrauchs im Strafverfahren. Eine Untersuchung unter besonderer Berücksichtigung der verfassungsrechtlichen Bezüge des Strafprozeßrechts* (Duncker & Humblot 2002) 88 ff.

⁴⁵⁶ *Bundesgerichtshof*: 7 November 1991, 4 StR 252/91 (1992) NJW 1245.

his right to submit evidence in order to prevent the proper conduct of the main proceedings, the court may order that in future the accused may submit evidence only through his defence counsel. The circumstances of the case were interesting: during the main proceedings, which began on 7 October 1988 and ended in September 1989, the accused submitted some 300 requests for evidence, which he withdrew after giving testimony. After the withdrawal of his testimony on 20 October 1989 (the 78th day of the trial) until 18 May 1990 (the 107th day of the trial), the court 'was almost exclusively occupied with receiving and responding to the accused's requests for evidence'. On 20 October 1989, the accused also announced that he wished to present 200 more ready-made requests for evidence. Finally, at the beginning of January 1990, another accused submitted some 8500 written requests for evidence, which - the accused in question stated that he supported (without knowing their content). The court did not admit most of these requests for evidence and, after assessing them in detail, concluded that a holistic consideration of the content of the requests, the manner and the order in which they were made showed that the accused was not attempting to establish facts by means of his requests. Therefore, the court indicated that there was no doubt that the accused grossly abused his right to file a request in order to delay the proceedings and to prevent a verdict that did not correspond to his expectations. In assessing this view, the BGH noted, that any abuse of the law which seriously and permanently undermines the efficient conduct of criminal proceedings by all participants in the proceedings, in accordance with the requirements of the rule of law, can be countered by restrictions based solely on the general prohibition of abuse, without any specific standard of intervention contained in the German Code of Criminal Procedure, at least if these restrictions do not in turn undermine the accused's right to be able to defend himself comprehensively.⁴⁵⁷ The relevant standard in this act is instead indicated in the wording of § 244 of the German Code of Criminal Procedure, which is, however, sometimes criticised, with the indication that an evidentiary application should also be able to be used to prove facts which the applicant only suspects or believes to be possible.

In this context, it is important to note the procedural solutions that have emerged in some jurisdictions, the purpose of which is precisely to enable the courts to counteract procedural obstruction by the parties. Such solutions include, for example, Article 4^[1] of the *Kodeks postępowania cywilnego* (Polish Code of Civil Procedure), introduced into Polish law in

⁴⁵⁷ *ibid.*

2019, which prohibits parties and participants in proceedings from making use of a right provided for in the procedural rules contrary to the purpose for which it was established. Related special solutions provide for sanctions in the event of a finding of abuse of the right in the form of a fine for the abusing party, the imposition of costs on such party, an increase in the costs payable to the opponent and the award of an increased rate of interest (Article 226^[1] of the *Kodeks postępowania cywilnego*).⁴⁵⁸

There is no doubt that there are many factors influencing the shape of judicial proceedings and the analysis made so far does not mention all of them. In fact, this is not the purpose of this study, which should only signal the efforts to streamline court proceedings in the various legal systems caused by deficits in this area. However, among the factors influencing the inefficiency of judicial proceedings, which may be relevant in the context of the future use of artificial intelligence in the administration of justice on a large scale, one should not forget about purely human factors. These include inadequate preparation of the hearing by the judge, unfamiliarity with the entirety of the court file, lack of concentration of the trial material, numerous adjournments of hearings, hearing of cases in parts, the need to notify the parties or related failures, as well as inactivity and tardiness, which are also types of failures.⁴⁵⁹ Incidental proceedings can also leave their mark, such as requests for the exclusion of a judge from dealing with a case, which serve to form the correct composition of the court, but are sometimes time-consuming, dispelling the spectre of a quick resolution of court proceedings.

Therefore, court proceedings that are lengthy are usually also inefficient. In practice, lengthy proceedings are those where a case is pending in court for an unreasonably long period of time, exceeding normal delays. Court proceedings are protracted, inefficient, when they take an irrationally long time, beyond a reasonable time frame, and the court does not take sufficient action to bring them to a conclusion. In doing so, there is no single, rigid time limit after which court proceedings are automatically considered to be protracted. The decisive factor is whether the case lasts longer than is reasonable and necessary in its circumstances.⁴⁶⁰

⁴⁵⁸ Agnieszka Laskowska-Hulisz, 'Sprzeczność czynności procesowych z dobrymi obyczajami a nadużycie uprawnień procesowych' (2020) 3 *Prawo i Więź* 9.

⁴⁵⁹ Cf. Marcin Rau, 'The Impact of the Human Factor on the Effectiveness of Criminal Proceedings. A Socio-psychological Perspective' in Artur Mezglewski (ed), *Efficiency of the Judiciary* (Instytut Wymiaru Sprawiedliwości 2021) 143-169.

⁴⁶⁰ Jerome Lefkowitz, 'Protracted Proceedings' (1979) 46 *Brooklyn Law Review* 1005.

The dynamics of judicial proceedings, their complexity and diversity, social changes and technological progress are important and specific elements to be recognised when discussing whether the current procedural law and the system design of the courts corresponds to modern requirements. The efficiency of the proceedings, due to the usually individual nature of a particular case, should therefore be assessed on a case-by-case basis in the context of specific court proceedings. This does not mean, however, that it is impossible to distinguish a number of general reasons influencing the assessment of efficiency of all types of proceedings in a given legal system. In doing so, the issue of efficiency may be analysed from the point of view of the constitutional and systemic role of courts, the position of the judge, the adequacy of court procedures, as well as formal guarantees of a fair trial. Efficiency of proceedings is counted among the basic assumptions of any functioning legal order. In turn, inefficiencies can have significant consequences that are worth looking into.

3.3. Negative consequences of inefficient judicial proceedings

The inefficiency of judicial proceedings has been a phenomenon assessed as undesirable for many years.⁴⁶¹ As early as the nineteenth century, there were observations in the public space - attributed to William E. Gladstone - that 'justice delayed is justice denied'. It was accepted, if legal redress or equitable relief to an injured party is available, but is not forthcoming in a timely fashion, it is effectively the same as having no remedy at all. This principle is the basis for the so-called right to a speedy trial⁴⁶² and similar rights which are meant to expedite the legal system, because of the unfairness for the injured party who sustained the injury having little hope for timely and effective remedy and resolution. The lack of implementation of this principle, the slowness, ineffectiveness and consequent dysfunctionality can have many negative consequences that affect both individuals and society as a whole. Therefore, states should take measures to ensure or improve the efficiency of judicial proceedings. Passivity in this matter is harmful.

One of the main consequences of the inefficiency of the justice system is a decline of public confidence in the judiciary. There is no doubt that such a state in which the public no longer trusts the justice system is undesirable.

⁴⁶¹ Corey Steinberg, 'Justice Delayed Is Justice Denied - The Abuse of the Pre-Arrestment Delay' (1992) 9 New York Law School Journal of Human Rights 403.

⁴⁶² Darren Allen, 'The Constitutional Floor Doctrine and the Right to a Speedy Trial' (2004) 26 Campbell Law Review 101.

Lack of trust in the judiciary is worse than lack of trust in the legislature or the executive. The legislature or the executive can be changed, but the judiciary cannot.⁴⁶³ Citizens cannot be told that if they do not like a court, they should choose a better one. Meanwhile, in EU countries, trust in the judiciary is declining. The annual surveys conducted for the EU Justice Scoreboard⁴⁶⁴ show worrying results. This is undoubtedly a serious impetus for action to restore public confidence in the justice system.

Lack of trust in the judiciary always implies a serious crisis of state authority. As the doctrine indicates, deepening distrust of one state institution by citizens may largely result from negative expectations regarding the future actions of other state institutions. Expressed dissatisfaction with the judiciary gives the government a mandate for change and is certainly a kind of call for such action. The evaluation of the correctness and efficiency of the functioning of the justice system must take into account the assessment and expectations of society.⁴⁶⁵

Trust has become one of the most frequently analysed phenomena in recent years, not only in sociology worldwide, but also in other social sciences, including legal sciences. It has gained importance with the development of modern social forms and has become an essential element of social capital. It often refers to trustworthiness, an indirect element that significantly influences the degree of trust. Social trust plays a particularly important role in the functioning of public institutions, especially the justice system. Citizens judge the quality and efficiency of the services provided in this public sphere not only by the standards of justice in force, but also, *inter alia*, by the excessively long waiting times for the outcome of the judicial

⁴⁶³ Ludivine Roussey and Bruno Deffains, 'Trust in Judicial Institutions: An Empirical Approach' (2012) 8 *Journal of Institutional Economics* 351.

⁴⁶⁴ The EU Justice Scoreboard was created in 2013 and is used by the European Commission to monitor the justice reforms taking place in Member States. The scoreboard covers the three main elements of an effective justice system: efficiency, quality and independence. Cf. <https://commission.europa.eu/document/123138e5-f651-44e4-963e-65b721c4f5e7_en> accessed 30 March 2025.

⁴⁶⁵ Dorota Konopka, 'Kryzys zaufania, a nie prawa - na przykładzie administrowania sądownictwem powszechnym w Polsce' in Kijowski Dariusz Ryszard and Suwaj Patrycja Joanna (eds), *Kryzys prawa administracyjnego. Inflacja prawa administracyjnego* (Wolters Kluwer 2012) 257 ff.

process. Citizens who experience delays, protractedness, can and generally do recognise that the legal system is inefficient and unreliable.⁴⁶⁶

The length of judicial proceedings may raise public doubts about the sense of the justice system, create a perception that individuals are not treated equally in courts, and that judges compromise the principle of independence. Naturally, there are many other reasons why society may lose confidence in the judiciary besides the length of judicial proceedings; however, the latter factor is of great importance and may in itself lead to a critical attitude of the public not only towards the courts, but also towards the law.⁴⁶⁷

The effect of court inefficiency can therefore be socially damaging in terms of undermining public confidence in the courts. Information about the length of proceedings, about waiting for justice to be served, creates critical views about judges and the functioning of the courts.⁴⁶⁸ This provokes a public debate, most often involving politicians, on the functioning of the judiciary. In such a debate, extreme cases are often publicised, judicial rulings are criticised without taking into account the complexity of the problems being assessed and, consequently, the authority of judges is questioned. This sometimes exaggerates the actual problems and causes a radicalisation of negative assessments directed at the courts and judges.⁴⁶⁹

The problem of trust in the judiciary is recognised in many countries. According to, for example, a survey in Germany on overall trust in the judiciary and the legal system, in autumn 2024 around 30% of respondents said that they rather did not trust the judiciary or the German legal system.⁴⁷⁰ These figures generally confirm the observations made by the European Commission for 2024 in its Rule of Law Report. Among other things, the

⁴⁶⁶ Monika Glavina and Esther van Zimmeren, 'Trust in Courts and Judicial Systems: A Conceptual and Methodological Review' in Frédérique Six and others (eds), *Handbook on Trust in Public Governance* (Edward Elgar 2025) 167-188.

⁴⁶⁷ Christoph Frank, 'Vertrauen in die Justiz: Voraussetzungen - Gefährdungen' in Heinz-Dieter Assmann, Frank Baasner and Jürgen Wertheimer (eds), *Vertrauen (Nomos)*.

⁴⁶⁸ Ralf Kniffka, 'Das Ansehen der Justiz in der Öffentlichkeit' (1981) 2 *Zeitschrift für Rechtssoziologie* 225.

⁴⁶⁹ Krystyna Daniel, 'Kryzys społecznego zaufania do sądów' (2007) 2 *Studia Socjologiczne* 61, 62 ff.

⁴⁷⁰ Cf. Report: <<https://de.statista.com/statistik/daten/studie/153813/umfrage/allgemeines-vertrauen-in-die-justiz-und-das-rechtssystem/>> accessed 30 March 2025.

European Commission indicated that in Germany the level of perceived judicial independence is now high among the general public and remains high among companies. Overall, 72% of the general population and 69% of companies perceive the level of independence of courts and judges to be 'fairly or very good' in 2024. The situation is different in Spain, where, according to the European Commission, only 37% of the general population and 32% of companies perceive the level of independence of courts and judges to be 'fairly or very good' in 2024 and in Poland, where only 28% of the general population and 22% of companies perceive the level of independence of courts and judges to be 'fairly or very good' in 2024.

In the context of Germany, the European Commission pointed out, *inter alia*, that according to the legal associations, in order for the judiciary to function properly, new posts for judges are needed, of which there is a shortage of around 1 500 (for judges and prosecutors), in view of 'increasing workload and processing times'. These types of challenges are expected to be further exacerbated by upcoming waves of retirements until 2030. It was also highlighted that the annual salaries of judges at the beginning of their career are the lowest in the EU compared to the average wages overall. At the same time, it was pointed out that the justice system overall continues to perform efficiently. Perhaps the reason for this is that the number of incoming civil and commercial litigious cases has continued a declining trend from the past years (1.2 cases at first instance per 100 000 inhabitants in 2022 compared to 1.3 in 2021). The disposition time in administrative cases at first instance has continued to decrease (from 422 days in 2021 to 408 days in 2022) and slightly increased for litigious civil and commercial cases at first instance (from 231 days in 2021 to 241 days in 2022). At the same time, the number of pending litigious civil and commercial cases as well as administrative cases at first instance decreased.⁴⁷¹

Specifying the data for Spain, the European Commission indicated that the perceived judicial independence among the general public in 2024 has increased in comparison with 2023 (34%), although it remains lower in comparison with 2020 (44%). The perceived judicial independence among companies has decreased in comparison with 2023 (34%), as well as with 2020 (42%). 41% of the companies in Spain are either fairly or very confident that their investments are protected by the law and courts in the

⁴⁷¹ 2024 Rule of Law Report. Country Chapter on the rule of law situation in Germany. Cf. <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en> accessed 30 March 2025.

Member State. 42% of the surveyed companies see the quality, efficiency or independence of justice as one of the main reasons for concern about investment protection in the country. The European Commission stressed that Spain, recognising these problems, is seeking measures to increase the efficiency of its judiciary. New posts for judges have been established and measures are being taken to address challenges regarding the resources of the justice system. In Spain the number of judges per inhabitant continues to be one of the lowest in the EU. The situation may worsen as in the coming years a significant number of judges is expected to retire. The *Consejo General del Poder Judicial* has presented a strategic plan for human resources in the judiciary for 2023-2032. According to this plan, around 315 new posts per year would be needed over the next ten years to ensure the proper functioning of the justice system in Spain. It also adopts *Real Decreto-ley 6/2023*⁴⁷² which establishes a legal framework for the digitalisation of justice, including an interoperable catalogue of digital services to be provided to citizens and legal professionals. It fosters the use of electronic case records, electronic processing of legal procedures and the use of digital solutions to conduct and follow court proceedings. Furthermore, the disposition time in civil, commercial, and administrative cases in first instance has slightly increased from 265 days in 2021 to 282 in 2022. The clearance rate for litigious civil and commercial cases decreased and was slightly below 100%, meaning that less cases are resolved than come in. The disposition time for civil and commercial cases in the Supreme Court has improved (from 826 days in 2021 to 691 days in 2022) but remains very high and has been raised as a concern.⁴⁷³

In the context of Poland, the European Commission also indicated that the level of perceived judicial independence among the general public in 2024 has increased in comparison with 2023 (23%), although it remains lower in comparison with 2020 (34%). The level of perceived judicial independence among companies has increased in comparison with 2023 (17%) but is still lower in comparison with 2020 (27%). The main reason cited by both the general public and companies for the perceived lack of independence of

⁴⁷² *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*, BOE-A-2023-25758.

⁴⁷³ 2024 Rule of Law Report. Country Chapter on the rule of law situation in Spain. Cf. <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en> accessed 30 March 2025.

courts and judges is the perception of interference or pressure from the Government and politicians. The European Commission also indicated that Poland is implementing a new Action Plan on the Rule of Law to address the longstanding concerns regarding judicial independence. In its assessment, the overall performance of ordinary and administrative courts continues to be relatively stable. As regards ordinary courts, while the estimated time needed to resolve civil, commercial, administrative, and other cases in 2022 further decreased (from 107 days in 2021 to 100 days in 2022), an opposite trend is seen in litigious civil and commercial cases in first instance courts (an increase from 330 in 2021 to 362 in 2022).⁴⁷⁴

Data from selected EU countries show that monitoring the efficiency of the judiciary can have an impact on its functioning, be a stimulant to take action to improve the parameters of its functioning. This is, one would think, the aim of the European Commission's annual reports, which also allows to work towards increasing confidence in the judiciary. As the European Commission itself points out, every year since 2020, the Rule of Law Report, by systematically and objectively examining rule of law developments in all Member States, has shown that the rule of law matters to citizens and businesses across the EU. This is why, the Commission has worked to build a rule of law architecture to help counter the risk that falling short on the rule of law poses to individual Member States, and to the EU as a whole. The goal of this work has been to promote a rule of law culture, to prevent rule of law problems from emerging or deepening, and to respond effectively at EU level to serious and persistent challenges. This called for a diversification of the rule of law instruments that could be used at EU level, so that action can be calibrated to best effect.⁴⁷⁵

It should also be noted that a low appreciation of the judiciary in society can and generally does have the effect of making citizens reluctant to be employed in various positions within the judiciary, so that the supply of staff to the judiciary can be hampered. The prospects for advancement in positions around the judiciary - at a time of crisis in the judiciary - are perceived to be poor, which may consequently impact on the quality of

⁴⁷⁴ 2024 Rule of Law Report. Country Chapter on the rule of law situation in Poland. Cf. <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en>(last accessed 30 March 2025).

⁴⁷⁵ 2024 Rule of Law Report. The rule of law situation in the European Union. Cf. <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en> accessed 30 March 2025.

staff remaining in the system. This also does not encourage law graduates to train for judicial office. These are further factors that a rational legislator should take into account. The judiciary as an unattractive employer is not a desirable state of affairs for improving judicial efficiency, especially when current judicial staff only see an improvement in their lot by leaving the court and new staff are reluctant to take up employment on the terms offered.⁴⁷⁶

One of the essential areas related to the efficiency of the judiciary is the area of trust in the justice system. Lengthy judicial proceedings significantly affect the assessment of this parameter of the administration of justice. For example, it can be said in criminal cases that a finding of guilt, and in particular a conviction handed down several or even decades after the crime was committed, must raise questions as to whether justice was actually served. The sense of repression and the advisability of the rehabilitation effect may also be questioned - years later. This will be questionable especially in relation to offenders who have not returned to crime over the years, lead stable lives after years and have become productive, valuable members of society. After a long period of time, the use of punishment for crimes may lose its meaning both from the perspective of justice and the effectiveness of the penal system itself. A person who committed a crime many years ago may change (change in the personality of the offender). He or she may undergo a process of rehabilitation, improvement and social reintegration. Punishment, which aims at education and rehabilitation, becomes less effective and appropriate in the case of people who have changed their behaviour. The changes that may have taken place in the offender's life over the years mean that the very punishment that was intended to be preventive may no longer be appropriate. When the crime was committed many years earlier, the penalty imposed may be seen as disproportionate to the gravity of the act in the context of the present circumstances.⁴⁷⁷ When the punishment is applied many years later, it may become a mere formality that has little impact on the public perception of the offender. Furthermore, after a long period of time since the act was committed, some legal systems may allow the punishment to be erased, recognising that after a certain period of time the

⁴⁷⁶ Olga Luisa Salanueva (ed), 'Confianza en la justicia: ¿Qué lugar ocupan los métodos autocompositivos?', *Confianza en la administración de justicia. Lo que dicen les abogades* (Universidad Nacional de La Plata 2020) 67-87.

⁴⁷⁷ Eyal Aharoni and others, 'Behavioral Sciences Punishment after Life : How Attitudes about Longer-than-Life Sentences Expose the Rules of Retribution' (2024) 14 *Behavioral Sciences* 855.

offender should not suffer consequences for his or her actions. This approach suggests, on the one hand, that punishment is of limited use if it does not lead to rehabilitation or influence the offender's behaviour and, on the other hand, that the inefficiency of the justice system must not burden the offender.⁴⁷⁸ Moreover, as penological science points out, after many years, punishment may no longer serve its preventive function, as the person who committed the crime may be a completely different person.⁴⁷⁹ Punishing a person who has changed his behaviour is difficult to justify if it is not based on the need to protect society. Therefore, it is generally accepted that criminal repression many years after the act has been committed may be inadequate, distorted and ineffective. Such action often becomes disproportionate and may lead to new wrongs instead of contributing to true justice. On the other hand, criminal cases not concluded within a reasonable time can lead to significant frustration among citizens. In cases involving domestic violence, fraud or other serious crimes, delays in the administration of justice can exacerbate social tensions. Victims of crime who wait many years for justice may not only feel stressed but may also not believe that the justice system is designed to protect their rights and interests.⁴⁸⁰

In civil matters, lengthy proceedings may not only distort the image of the actual administration of justice, but also result in legal protection being merely illusory. Among the negative factors of the lengthy proceedings are the loss of value of a service due to the devaluation of money, the disposal or loss of value of property to which enforcement can be directed or the loss of usefulness of things due to the passage of time or technological progress. Citizens may therefore lose faith in justice and distrust judicial institutions. Individuals who experience delays may be discouraged from exercising their rights, finding judicial proceedings too complicated and time-consuming. Prolonged involvement in court processes can result in experiencing high levels of stress, related to, among other things, uncertainty about the outcome of the case, making it difficult to plan for the future. Lengthy proceedings also hinder access to justice, especially for those who lack the financial or

⁴⁷⁸ Darryl K Brown, 'The Perverse Effects of Efficiency in Criminal Process' (2014) 100 *Virginia Law Review* 183.

⁴⁷⁹ Liam J Leonard, *Global Perspectives on People, Process, and Practice in Criminal Justice* (IGI Global 2021) passim.

⁴⁸⁰ Cf. Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (University of Toronto Press 1999) 115 ff.

legal resources to persevere in a lengthy court case.⁴⁸¹ In civil cases involving financial claims, lengthy proceedings mean that parties cannot recover the amounts owed to them, which can lead to permanent financial harm. In cases involving damages or contractual debts, inefficient processes may mean that the injured party remains without compensation for a long time.⁴⁸² This exacerbates his or her financial difficulties and the lengthy process means that any form of compensation is delayed. Furthermore, many years after the incident, the circumstances of the case may change and the compensation itself may no longer be adequate in relation to the actual damage, if only because of the changing health situation of the victims. In cases that involve violations of personal rights, protracted proceedings may lead to damage to the reputation of the parties, the violations may affect the perception of the person concerned in a negative light, which may affect his or her image and social life.⁴⁸³

The efficiency of court proceedings is also important for family cases. Protracted family cases can have serious consequences for all parties involved.⁴⁸⁴ In this context, it is emphasised, *inter alia*, that the failure of the court to react promptly (e.g. by taking away the child) can have irreversible consequences, including even a risk to health or life. Prolonged child custody disputes cause additional stress, anxiety and insecurity, and using children as a tool in a prolonged conflict between parents can also affect their emotional and psychological problems.⁴⁸⁵ A prolonged dispute often in this area leads to an escalation of the conflict and a deterioration of the relationship between the parties. In addition, those, for example, involved in protracted divorce or property division cases are often unable to move on with their lives. According to studies sometimes conducted, until a divorce is finalised, many people are unable to emotionally detach themselves from the past. Persistent

⁴⁸¹ Sergey Kurochkin, 'Goals of Civil Litigation: Finding of a Common Understanding to Ensure Litigation Efficiency' (2020) 5 *Kazan University Law Review* 105.

⁴⁸² Herbert N Weissman, 'Distortions and Deceptions in Self Presentation: Effects of Protracted Litigation in Personal Injury Cases' (1990) 8 *Behavioral Sciences & Law* 67.

⁴⁸³ Rožek (n 391) *passim*.

⁴⁸⁴ Barbara A Babb, 'Family Courts Are Here to Stay, so Let's Improve Them' (2014) 52 *Family Court Review* 642.

⁴⁸⁵ Andrew Shepard and James W Bozzomo, 'Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts' (2003) 37 *Family Law Quarterly* 333.

conflict and formal ties with an ex-partner also make it difficult to come to terms with the break-up of the marriage and start a new life.⁴⁸⁶

Dysfunctional courts in a country are also one of the factors considered by foreign investors and therefore relevant to economic development. Poor enforcement of private contracts increases transaction costs and discourages private participation in financial transactions, as well as acting as an impediment to growth in firm size and causing liquidity constraints, limiting lending and increasing interest rates. There are a number of studies highlighting the importance of improving judicial efficiency to promote economic growth. Failures in the protection of rights and freedoms associated with lengthy judicial proceedings can undermine savings and investment through poor protection of their profits, increase obstacles to attracting foreign direct investment, mean productivity declines and cause capital outflows, worsening the business climate and eliminating vital funds used to finance investment plans.⁴⁸⁷

Generalizing the negative consequences of the inefficiency of court proceedings, it may be pointed out that, with the passage of time, the individual decision may lose its significance for the parties. This happens, for example, due to changes in socio-economic reality or technological progress, as well as changes related to the situation of the litigants. The very fact of the trial creates a transient indeterminacy of rights which, on the one hand, causes more or less significant, depending on the validity of the trial, turbulence in the daily activities of litigants, and, on the other hand, has a detrimental effect on the entire legal system. Dysfunctional judicial systems that fail to ensure the security of rights and the enforcement of contracts constitute serious obstacles to the dynamics of economic growth. The efficiency of judicial proceedings is therefore crucial both for citizens

⁴⁸⁶ Uzma Khan and Fazail Asrar, 'Enhancing Access to Justice in Pakistan ' s Family Courts: Challenges and Legal Reforms' (2024) 3 Traditional Journal of Law and Social Sciences 56.

⁴⁸⁷ Cf. Panayotis Kapopoulos and Anastasios Rizos, 'Judicial Efficiency and Economic Growth: Evidence Based on European Union Data' (2024) 71 Scottish Journal of Political Economy 101. we estimate a growth equation controlling for alternative *de facto* judicial efficiency indicators. Our findings suggest that operational inefficiencies of judicial systems undermine economic growth, weakening its capability to safeguard the enforcement of private contracts and the security of property rights. Our results are robust when we account for endogeneity and also provide significant policy implications.

and for the functioning of the legal system as a whole.⁴⁸⁸ Indeed, justice that comes too late often loses its value. There is solid evidence that countries characterised by faster courts are not affected by the deterioration of the administration of justice.⁴⁸⁹ Justice delayed is therefore justice denied.⁴⁹⁰ For a person seeking justice, the time taken for resolution of their issue is critical to the justice experience.⁴⁹¹

It may be added that the lengthiness of court proceedings is also disadvantageous from the point of view of judges. It reduces the efficiency of their adjudication, if only because judges have to remember the details of many cases simultaneously, which makes it difficult to adjudicate accurately and fairly. This decreases the quality of judicial decisions, which also appears to be crucial for the efficiency and credibility of the entire justice system. The low quality of jurisprudence leads, among other things, to legal chaos and uncertainty in legal transactions. Hence, reliable judgments that are well-founded, carefully prepared are also an important value, which is sometimes not respected in the current conditions due to, inter alia, often lengthy court proceedings. Meanwhile, flawed judgments or those that are less understood by the parties are more often appealed by their parties, generating further cases, burdening the higher courts. From the judges' point of view, too, the speedy and fair handling of cases is crucial to the efficient functioning of the justice system.⁴⁹²

3.4. Instruments to prevent inefficiencies in judicial proceedings

Various measures are taken or recommended to increase the efficiency of judicial proceedings. In different countries, due to the different condition and position of the judiciary, as well as the differently shaped trust of citizens in the judiciary, these measures are not identical. They are presented in detail, among others, in the European Commission's annual report on the rule of

⁴⁸⁸ Indriati Amarini and others, 'Digital Transformation: Creating an Effective and Efficient Court in Indonesia' (2023) 31 *Legality: Jurnal Ilmiah Hukum* 266.

⁴⁸⁹ Alessandro Melcarne, Giovanni B Ramello and Rok Spruk, 'Is Justice Delayed Justice Denied? An Empirical Approach' (2021) 65 *International Review of Law and Economics* 105953.

⁴⁹⁰ *ibid* 15.

⁴⁹¹ Tania Sourdin and Naomi Burstyn, 'Justice Delayed Is Justice Denied' (2014) 4 *Victoria University Law and Justice Journal* 49.

⁴⁹² Colleen Cullen, 'The Nonexistent Speedy Trial Right' (2024) 51 *Pepperdine Law Review* 661.

law in individual EU member states. It outlines the measures being taken to increase efficiency and citizens' trust in the justice system and considers what possible relevance further digitisation may have in the coming years.

In the context of Spain, it was indicated, *inter alia*, that new measures to enhance the efficiency of the justice system have been adopted. *Real Decreto-ley 6/2023* introduces measures aimed at improving procedural efficiency while preserving procedural guarantees for citizens, including new adjustments for the elderly and disabled. The purpose of the new legal framework is also to shorten the length of proceedings through various means, including groupings of actions and the increase of the use of digital tools. The entry into force of this law is part of a specific milestone contained in the *Plan de Recuperación, Transformación y Resiliencia*. *Real Decreto-ley 6/2023* also introduces amendments to increase the speed of judicial procedures in the administrative jurisdiction and amends the appeal processes to avoid undue delays. Further measures to improve the organisational and procedural efficiency of the justice system were adopted lately, on 2 January 2025, when *Ley Orgánica 1/2025* on measures to improve the efficiency of the public justice service was enacted.⁴⁹³ This law amends the Spanish judicial map, with an emphasis on establishing, among other things, alternative dispute resolution mechanisms and further speeding up court proceedings in criminal, civil and administrative matters.⁴⁹⁴

It can be added that the Spanish Ministry of Justice is working on some projects with artificial intelligence in the judiciary. These projects are at various stages of development and implementation. They concern, for example, the automatic classification of documents, their processing, e.g. for anonymisation purposes, the automatic merging of criminal sentences (*Calculadora 988*), the automatic deletion of criminal records, automatic voice transcription or automatic biometric identification.⁴⁹⁵ The Spanish state therefore sees the need to develop in this direction in order to increase the efficiency of the judicial system.

⁴⁹³ *Ley Orgánica 1/2025, de 2 de enero, de medidas en materia de eficiencia del Servicio Público de Justicia*, BOE-A-2025-76.

⁴⁹⁴ Cf. 2024 Rule of Law Report. Country Chapter on the rule of law situation in Spain. Cf. <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en> accessed 30 March 2025. The report refers to the draft bill.

⁴⁹⁵ Lorenzo Pérez (n 53) 27 ff.

In turn, the above-mentioned European Commission report stresses, *inter alia*, that the level of digitalisation of justice in Germany is overall very good, notably with regard to the use of digital technology and electronic communication tools by courts and prosecution, or arrangements for machine readable judgments. Procedural rules allowing digital technology in courts in civil, commercial, and administrative cases are in place. With regard to criminal cases some gaps remain for digital solutions to conduct and follow court proceedings. A digitalisation initiative for the justice system includes funding of up to EUR 200 million for the period from 2023 to 2026. In 2023, the funding of twelve projects of the Federal Government and the Länder amounting to EUR 112 million for 2023-2026 was approved and implemented, and additional projects are being prepared. Furthermore, in November 2023, the Federal Government and the Länder agreed that the digitalisation of justice must go hand in hand with a modernisation of the procedural rules. To this end, they decided to convene a joint reform commission to draw up proposals for the civil procedure of the future, which has commenced its work in July 2024. In addition, in March 2024, the Government submitted to Parliament a legislative proposal to further digitalise the judiciary. The proposal includes a simplification of the electronic submission of certain motions for lawyers and parties, more flexible solutions for the transition to fully electronic court files as of 2026, and the possibility for parties to participate in the main appeal hearing via videoconference in criminal matters before the Federal Court of Justice. As noted in the 2023 Rule of Law Report, the Federal Government had, in May 2023, submitted a proposal to further expand the possibility of videoconferencing in civil and specialised courts to the Federal Council, which was subsequently adopted on 14 June 2024.⁴⁹⁶

It was highlighted that several legislative proposals have also been undertaken in Germany aiming at increasing the attractiveness of Germany as a location for civil and commercial cases. On 4 July 2024 Parliament adopted a proposal to create 'commercial courts', with the aim to make the German justice system more attractive for large and international commercial disputes. These commercial courts will take the form of specialised senates that the Länder can create at a higher regional court to hear first instance commercial cases above a dispute value of EUR 500 000, with the possibility

⁴⁹⁶ 2024 Rule of Law Report. Country Chapter on the rule of law situation in Germany. Cf. <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en> accessed 30 March 2025.

to conduct proceedings in English. This proposal aims to address long-standing calls by the Länder. The Federal Council has generally welcomed the proposal but criticised the limitation to certain areas of law and to disputes involving companies. Stakeholders have also expressed overall support, though business representatives have questioned the high threshold for the dispute value. With a similar objective of increasing the attractiveness of Germany as a location for arbitration, on 26 June 2024 the Government submitted a proposal for the modernisation of arbitration law to Parliament. The proposal foresees *inter alia* the possibility to conduct arbitration-related court proceedings in English, enhanced digitalisation of arbitration proceedings and the possibility to publish the decisions, with agreement of the parties. Finally, a legislative proposal submitted to Parliament on 5 June 2024 foresees further measures as regards civil proceedings, notably strengthening local courts by increasing the dispute value threshold for cases that can be heard at their level and clarifying the division of competences between local and regional courts to improve specialisation.⁴⁹⁷

The German state is therefore taking several initiatives that aim to use new technologies in the administration of justice and is developing in this direction. It can be thought that this development will be progressive, recognising a number of advantages of using new technologies on a large scale.

As far as Poland is concerned, the above-mentioned European Commission report focused on systemic issues related to the current crisis surrounding the *Krajowa Rada Sądownictwa*, without indicating any detailed plans for improving the efficiency of the Polish judiciary system.⁴⁹⁸ Meanwhile, it should be pointed out that also in Poland there are plans to further digitise, or more broadly, increase the efficiency of the judiciary. For example, there are plans to gradually move away from paper documents, to introduce a systematic process of scanning paper files, and to improve access to data from digital documents. Also in preparation is the launch of online filing of pleadings in civil and criminal proceedings. The Polish government, however, is also considering, in the relatively distant future, the use of AI in the common courts, e.g. for robotisation and automation of processes. Before this can happen, however, it is first necessary to build awareness and prove

⁴⁹⁷ *ibid.*

⁴⁹⁸ 2024 Rule of Law Report. Country Chapter on the rule of law situation in Poland. Cf. <https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en> accessed 30 March 2025.

that the technology is suitable for use in the administration of justice.⁴⁹⁹ In turn, work on the digital court, as announced by the Ministry of Justice in Poland, is expected to last until 2029.⁵⁰⁰

Of course, these are not all the remedies taken to improve the efficiency of the justice systems in the various countries. However, the above shows that public authorities are aware of the needs involved. It is interesting to note, in this regard, that none of the European state positions presented by the European Commission explicitly advocate the need to apply artificial intelligence on a wider scale, including as regards judicial decision-making. However, such statements do appear in the national space.

In addition to systemic measures, legal instruments enabling the parties to protect their rights may - and most often do - turn out to be important in practice. Such an instrument is, for example, the party's complaint for protraction of court proceedings currently in force in Poland, an instrument which may be used in the course of proceedings which, in the opinion of a party, take too long. According to the provisions of the Act of 17 June 2004 on a complaint for violation of a party's right to have a case heard without undue delay,⁵⁰¹ under Article 2 of this Act, the party may lodge a complaint to have the proceedings in question declared to be in breach of its right to have the case tried without undue delay. This will be justified if the proceedings aimed at issuing a decision ending the litigation last longer than necessary to clarify the relevant factual and legal circumstances or last longer than necessary to settle a case of enforcement or another case concerning the execution of a court decision (protraction of proceedings).⁵⁰² In order to determine whether there has been a lengthiness of proceedings in a case, it is necessary in particular to assess the timeliness and correctness of the actions taken by

⁴⁹⁹ Cf. Monika Blandyna Lewkowicz, 'Sztuczna inteligencja w sądownictwie. Poznałismy szczegóły' *CyberDefence24.pl* (10 May 2024) <<https://cyberdefence24.pl/polityka-i-prawo/sztuczna-inteligencja-w-sadownictwie-poznalismy-szczegoly>> accessed 30 March 2025.

⁵⁰⁰ Information available online at: <<https://www.gov.pl/web/sprawiedliwosc/program-cyfrowy-sad-zmieni-wymiar-sprawiedliwosci>> accessed: 30 March 2025.

⁵⁰¹ *Ustawa z 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*, Dziennik Ustaw 2023, item 1725.

⁵⁰² Michał Szwał, 'Skuteczność Skargi Na Przewlekłość Postępowania Przed Naczelnym Sądem Administracyjnym (w Świetle Orzecznictwa)' (2021) 4 *Ruch Prawniczy Ekonomiczny i Socjologiczny* 49.

the court in order to issue a decision concluding the proceedings in the case, or the actions taken by the prosecutor conducting or supervising the pre-trial proceedings in order to conclude the pre-trial proceedings, or the actions taken by the court or bailiff in order to conduct and conclude an enforcement case or another case concerning the enforcement of a court decision.⁵⁰³ In making this assessment, account shall be taken of the cumulative duration of the proceedings to date from the commencement of the proceedings to the date of the examination of the complaint, irrespective of the stage at which the complaint was brought, as well as the nature of the case, the degree of its factual and legal complexity, the importance to the party who brought the complaint of the issues decided therein and the conduct of the parties, in particular the party who alleged that the proceedings were protracted.⁵⁰⁴

The circumstances in which these Polish laws came into force are interesting. This is because the legislative work was initiated as a result of the decision of the European Court of Human Rights in the case of *Kudła v. Poland* in 2000.⁵⁰⁵ The criminal case, which involved a party to proceedings before the ECtHR, had been pending before the Polish courts since 1991, and was pending before the Supreme Court at the time of its consideration by the ECtHR in 2000. The applicant argued, *inter alia*, that his right to a trial 'within a reasonable time' had not been respected and that there had thus been a violation of Article 6(1) ECHR. The applicant argued, *inter alia*, that the authorities themselves had made the case complicated because they had improperly organised it. Firstly, an indictment was brought against the applicant and nine co-defendants, despite the fact that the charges against them were unrelated to the charges against the applicant. This resulted in ninety-eight witnesses being called when the testimony of only seven of them was relevant to the applicant's case. Secondly, the court had an improper composition in the proceedings before the court of first instance, which resulted in the judgment being set aside and the case being remitted for retrial. Thirdly, the court was too late in issuing the order excluding the appellant's case for separate consideration and, as a consequence, only

⁵⁰³ Ewa Bagińska, 'Skarga na przewlekłość postępowania i prawo do „odpowiedniej sumy pieniężnej” z tytułu naruszenia prawa strony do procesu w rozsądnym czasie - fiasko polskiego modelu kompensacyjnego?' (2016) 36 Gdańskie Studia Prawnicze 27.

⁵⁰⁴ Czesław Kłak, 'Rozpatrzenie sprawy bez nieuzasadnionej zwłoki i skarga na przewlekłość postępowania: zagadnienia wybrane' (2011) 2 *Ius Novum* 82.

⁵⁰⁵ *European Court of Human Rights: 26 October 2000, Kudła v. Poland*, App. No. 30210/96.

dealt with his case after the first instance judgment had been set aside. Had the court done so at the outset of the proceedings, the charges against the applicant would have been dealt with earlier. He also claimed that the main reason why the proceedings had taken so long was the inefficient manner in which his case had been handled. He also complained about the lack of a legal remedy with which he could challenge the length of the proceedings.⁵⁰⁶

In assessing the circumstances of the case, the European Court of Human Rights indicated that there had been a delay in the proceedings for which it found insufficient justification and which it considered incompatible with the standard required by Article 6(1) ECHR. At the same time, it found that the case also had a violation of Article 13 ECHR, as the applicant had no domestic remedy on the basis of which he could implement his right to a 'hearing within a reasonable time'. The Court therefore required Poland to take steps to address the problem of protraction, including precisely creating a means of complaining about the length of the proceedings. Implementing the general recommendations for the implementation of the *Kudła v. Poland* judgment, the law providing for a complaint for the so-called protraction of court proceedings has been passed.

An analogous instrument is known to German law, which is also a consequence of the judgment of the European Court of Human Rights in *Sürmeli v. Germany*.⁵⁰⁷ The Court ordered the German government to create an effective measure against the excessive length of proceedings in German law. Germany, which had provided for the possibility of lodging a complaint with the Federal Constitutional Court (recognised by the ECtHR as ineffective), initially ignored this prohibition. As a result, the ECtHR initiated a pilot procedure and, in 2011 the law on legal remedy for protracted court and pre-trial proceedings (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*) was enacted.⁵⁰⁸ According to the provisions of the Act, any person who has suffered damage as a result of the unreasonable length of court proceedings should be adequately compensated. The appropriateness of the length of the proceedings depends on the circumstances of the specific case, in particular

⁵⁰⁶ Dominika Czerniak, 'Right to complain about excessive length of proceedings and to claim compensation' (2017) 4 *Ius Novum* 119.

⁵⁰⁷ *European Court of Human Rights: 8 June 2006, Sürmeli v. Germany*, App. No. 75529/01.

⁵⁰⁸ *Bundesgesetzblatt* 2011, No. 60.

the difficulty and seriousness of the proceedings and the behaviour of the parties involved and third parties.⁵⁰⁹

In Spain, on the other hand, the ‘remedy’ for protracted proceedings is the ‘constitutional *amparo*’, i.e. an individual complaint for the protection of rights, which is heard by the Constitutional Court. The basis of the complaint when alleging protraction of proceedings is a violation of the right to a fair trial without undue delay (Article 24(2) of the Spanish Constitution). In doing so, the legal remedy indicated is of a purely disciplinary nature. On the other hand, Article 292 of the *Ley Orgánica del Poder Judicial* provides for the possibility of claiming compensation for damage resulting from the malfunctioning of the judiciary.⁵¹⁰

This state of affairs may raise some doubts, especially since, as is pointed out, to be considered an effective remedy, a constitutional complaint must be directly accessible by individuals. What is relevant is the competence of the constitutional court. For where a constitutional court’s powers are limited to a declaration of unconstitutionality and a request to the court concerned to expedite or conclude the proceedings, without the possibility of ordering specific acceleratory measures or awarding compensation, and where the actual impact of the request on subsequent proceedings is uncertain, a constitutional complaint may be ineffective.⁵¹¹ In Spanish practice, various disputes arise over the lengthiness of judicial proceedings. Recently, the Spanish Constitutional Tribunal, in a judgment of 17 April 2023, for example, held that the constitutional right to judicial protection was violated by a court that set a trial date for a date indicated to be approximately two years after the lawsuit was filed. However, it does not provide for a specific remedy for the harm caused, leaving it to the judge processing the case to decide how to apply the ruling.⁵¹² Interestingly, in the case, the response to the complaint indicated, among other things, that the delay was due to an unmanageable

⁵⁰⁹ Sebastian Müller and Christoph Gusy, ‘The Interrelationship between Domestic Judicial Mechanisms and the Strasbourg Court Rulings in Germany’ in Dia Anagnostou (ed), *The European Court of Human Rights Implementing Strasbourg’s Judgments on Domestic Policy* (Edinburgh University Press) 27 ff.

⁵¹⁰ Andres Jimenez Rodriguez, *La responsabilidad del estado por el anormal funcionamiento de la administracion de justicia* (Universidad de Granada 1990) passim.

⁵¹¹ As indicated, inter alia, in the already cited case decided by the *European Court of Human Rights*: 8 June 2006, *Sürmeli v. Germany*, (n 507).

⁵¹² *Tribunal Constitucional de España*: 17 April 2012, 31/2023, BOE-A-2023 12073.

volume of work, as well as the formation of a judicial procedure that did not foresee the type of case that was to be heard before the ordinary court as a category of urgent cases. It was also argued that it would have been desirable to satisfy the applicant's claims and thus grant a new trial date before the one set as remote, but doing so would have violated the principle of equality before the law, as it would have been necessary to override the trial schedule for other cases filed earlier, without the existence of any specific and qualified urgency that would have recommended expediting the trial of the case.

Leaving in the hands of the parties an instrument for the efficient functioning of the justice system is ambiguous. For it implies not only the realisation of the rights of a party, but also that legislators assume in advance that there may be something wrong with the functioning of their systems. Meanwhile, there is a need to strive for a continuous improvement in the efficiency of justice systems.

The problems indicated above, as well as other issues, appear in institutional studies related to the future of justice in Europe. This future is supposed to involve, inter alia, the use of artificial intelligence. Such a future is seen, for example, by the European Union, which, in its '*Study on the use of innovative technologies in the justice field*' published on 14 September 2020, considers the use of artificial intelligence and blockchain/DLT technologies in the justice field to be a priority.⁵¹³ The document identifies 130 projects in this field (using innovative technologies in the justice field) in EU countries and proposes the creation of an EU legal and policy framework for future action. It is recalled that in the doctrinal discussion on this field, researchers and organisations debate various legal and ethical aspects. These aspects include the provision of guarantees for fundamental rights and freedoms, such as respect for private life, protection of personal data, fair trial, good administration or non-discrimination.⁵¹⁴ It also recalled that several important papers have been prepared analysing the impact of AI on these

⁵¹³ Report: 'Study on the Use of Innovative Technologies in the Justice Field. Final Report' (European Commission 2020) <<https://op.europa.eu/en/publication-detail/-/publication/4fb8e194-f634-11ea-991b-01aa75ed71a1/language-en>> accessed 30 March 2025.

⁵¹⁴ Cf. Patrick Perrot, 'What about AI in Criminal Intelligence? From Predictive Policing to AI Perspectives' (2017) 16 European Police Science and Research Bulletin 65; Tiffany Li and others, 'Humans Forget, Machines Remember: Artificial Intelligence and the Right to Be Forgotten' (2018) 34 Computer Law & Security Review 304; Nemitz (n 178); Aleš Završnik, 'Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings' (2021) 18 European Journal of Criminology 623.

rights and debating whether the existing legal framework is sufficiently adapted and adequate to deal with potential problems, and whether it is flexible enough to cope with the complexity and pace of development of the technology.

As suggested by some of the statements in the doctrine, the document also notes that AI technology for dispute resolution is currently underused, and its application remains at a rudimentary level. This can be understood to mean that we are still in an area that will develop and has great potential. Therefore, if the EU, a strongly institutionalised structure, is thinking about the future of justice in terms of the use of AI, it is highly likely that such a future in a more institutionalised form will happen. This is evidenced by the latest published *Report on the use of Artificial Intelligence in the judiciary, based on the information contained in the CEPEJ's Resource Centre on Cyberjustice and AI* prepared by the European Commission for the Efficiency of Justice.⁵¹⁵ The Report lists 125 tools developed by the end of 2024 to improve the effectiveness and accessibility of justice, mainly in Europe. It indicates that according to the available information, there are no fully automated AI systems in the European countries that could function entirely independently in the courts (so called '(ro)bot-justice'). This suggests that the idea of replacing a judge with a machine is not yet backed by the data available at the *Centre on Cyberjustice and AI*.⁵¹⁶ However, this does not mean that further research in this area should not be conducted.

This is certainly also recognised by the Council of Europe, which in a 2018 document *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment* identified five fundamental principles for shaping the practice of justice with artificial intelligence.⁵¹⁷ These are: (1) respect for fundamental rights, (2) equal treatment and anti-discrimination, (3) data quality and security, (4) transparency, impartiality and fairness, (5) operation of AI systems under user control. The Charter is intended for public and private stakeholders responsible for the design and

⁵¹⁵ 'Report on the Use of Artificial Intelligence (AI) in the Judiciary, Based on the Information Contained in the CEPEJ's Resource Centre on Cyberjustice and AI' (2025) <<https://rm.coe.int/cepej-aiab-2024-4rev5-en-first-aiab-report-2788-0938-9324-v-1/1680b49def>> accessed 30 March 2025.

⁵¹⁶ *ibid* 12.

⁵¹⁷ The Charter was adopted in Strasbourg on 3-4 December 2018 and is available online at: <<https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>> accessed 30 March 2025.

implementation of AI-based tools and services that involve the processing of judicial decisions and data (machine learning or other methods derived from data science). It also concerns public decision-makers responsible for legislative or regulatory frameworks. It should therefore be seen as an important guideline for future solutions that have the potential to revolutionise the justice system.⁵¹⁸

Since there is no doubt that one of today's shortcomings of the justice system is its inefficiency, and this problem affects many legal systems, as can be seen, for example, in the number of complaints appearing in the European Court of Human Rights in connection with the so-called protraction of court proceedings,⁵¹⁹ this problem must be solved. The lack of electronic communication between the courts and the public, the lack of electronic communication between institutions, the lack of electronic documents in court proceedings and the reliance on traditional documentation, the lack of use of electronic signatures or the lack of an electronic filing office in courts in general are still significant problems in many countries.⁵²⁰ Some of these problems are already being solved in certain justice systems, including, for example, China or the United States of America, but also through the aforementioned solutions in European countries, including Germany, Spain or Poland. These instruments are slowly finding their place in the paradigm of a fair trial. At the same time, there is no doubt that the importance of the so-called fair trial will evolve in the coming years, due to technological needs and possibilities. In turn, the evolution is likely to move towards establishing the importance and possible impact of technological tools of all generations, including artificial intelligence, on the rights of the litigant.

Projects based on algorithms using artificial intelligence or other state-of-the-art solutions are now becoming elements of the strategies of individual states in the context of the future development of justice systems.⁵²¹ Relevant

⁵¹⁸ Irina Zlătescu and Petru-Emanuel Zlătescu, 'Implementation of the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment' (2019) 1 *Law Review* 237.

⁵¹⁹ Between 1959 and 2020, the ECtHR found violations of Article 6 ECHR in such cases in 5950 cases, of which, for example, 608 involved Turkey, 443 Poland and 1202 Italy. Cf. 'European Court of Human Rights. Annual Report 2020' (2021) 164.

⁵²⁰ Cf. Aleksandra Klich, 'Electronic Communication with Public Administration in the Time of COVID-19—Poland's Experience' (2021) 18 *International Journal of Environmental Research and Public Health* 1.

⁵²¹ Cf. Justus Uitermark and Walter Nicholls, 'Planning for Social Justice: Strategies, Dilemmas, Tradeoffs' (2017) 16 *Planning Theory* 32; Yves Emery, Lorenzo G De

activities related to the further development of new technologies are also emerging at international level. Undoubtedly, artificial intelligence and its further developments are a path from which there is no turning back. There are many ideas in this area. The next stage, as can be seen from the perspective of European countries, is the application of tools that would allow the transformation of the judiciary, at least in some categories of cases, into an automated system to be able to resolve disputes without the need for human judges and the traditional 'analogue' court system. The possibility of automated decision-making *ex machina* appear to be the future. Whether this is entirely possible is still unclear, especially without looking at the potential functionalities of these systems, which are already known in practice.

3.5. Summary

According to prevailing standards, as enunciated inter alia by the European Commission, well-functioning, efficient and fully independent justice systems are crucial for the application and enforcement of EU and national law and respecting the rule of law. Judicial independence is integral to the task of judicial decision-making and stems from the principle of efficient judicial protection. Independent judges and courts guarantee the fairness of judicial proceedings and the protection of individual rights and are crucial for ensuring that justice works to the benefit of citizens and of businesses. They are also essential for judicial cooperation across the EU, which is a key objective in the area of freedom, security and justice. Access to independent courts and judicial review are fundamental to the rule of law. Well-functioning and fully independent justice systems can have a positive impact on investment and are crucial for investment protection, thereby contributing to economic growth and competitiveness.

The efficiency of justice systems is a necessary condition for the protection of rights, legal certainty and public confidence in the rule of law. An efficient justice system manages its caseload and delivers decisions without undue delay. Excessively long, protracted proceedings and backlogs undermine the trust of citizens and businesses in national justice systems.

In several Member States, new measures are in place to improve the efficiency of the justice system. An effective justice system needs adequate resources, including the necessary investments in infrastructure, and well-

Santis and Vera Hertig, *Peut-on manager la justice? Kann man die Justiz managen? Can we manage the judiciary?* (Stämpfli Editions 2015) *passim*.

qualified, trained and adequately paid staff. Despite some steps, some Member States still face long-standing challenges as regards the efficiency of justice systems. Changes to the structure of the justice system, including its administration, should be based on a clearly defined objective that must be formulated in such a way as to consider not only one but many specific conditions for development, both specific to the country concerned and adapted to the broader context, such as European law. At the same time, artificial intelligence seems to be a tool that is increasingly being proposed to improve the efficiency of the justice system in individual countries.

Chapter 4. Possible areas for the use of artificial intelligence to improve efficiency of judicial proceedings in a democratic state

4.1. General comments

From the considerations so far it follows, inter alia, that the efficiency of court proceedings is one of the values realising the right to a fair trial. Efficient and smoothly conducted proceedings, quick and universal access to justice, lack of delay in the examination of court cases - all of these speak in favour of seeking solutions that will allow the courtroom to restore its due splendour, which it has recently lost, at least in some countries. As is well known, various solutions have long been applied in individual countries to improve judicial proceedings. This is because it has long been recognised that new technologies, which have been used in various industries for a long time, can also assist the judiciary.⁵²² Today, no one in the modern world thinks of taking minutes of judicial proceedings by hand, and no one prepares reasons for judgments in this way. Therefore, it should come as no surprise that artificial intelligence, as a technological tool, with the known and increasingly widespread possibilities of its application in various industries,⁵²³ can also potentially be an important tool to support the judiciary.⁵²⁴ Lawyers from all over the world are already pondering how to shape judicial proceedings

⁵²² Marcelo Corrales, Mark Fenwick and Helena Haapio (eds), *Legal Tech, Smart Contracts and Blockchain* (Springer 2019) passim.

⁵²³ Paweł Księżak and Sylwia Wojtczak, 'Prawa Asimova Czyli Science Fiction Jako Fundament Nowego Prawa Cywilnego' (2020) 60 *Forum Prawnicze* 57.

⁵²⁴ Katarzyna Latek, 'Roboty w togach i rozprawy na WeChatcie? Analiza przyczyn i sposobów wykorzystania nowych technologii w chińskim sądownictwie oraz charakterystyka zagrożeń z tym związanych' (2023) 23 *Gdańskie Studia Azji Wschodniej* 224.

(including with the use of AI) so that the courts can meet public expectations regarding their functioning.⁵²⁵

Today's court and justice system are very different from what they were a decade or so ago. The first example of this is the availability of case law online. This means that today, in principle, anyone interested can easily access this case law. If it were not for modern technology, such a possibility would not exist; one would still have to browse through thousands of pages of court files or various archives. Technological changes can also be seen in individual court procedures.⁵²⁶ Procedural rules have undergone significant changes in recent years. Typically 'analogue' judicial proceedings are already becoming 'digital' proceedings. This was accelerated in the wake of the COVID-19 pandemic, when the work of the courts was suspended for a while and a large-scale search began for solutions that could be a kind of panacea for the social isolation orders in place during the pandemic.⁵²⁷

For this reason alone, a consideration of the possible application of artificial intelligence in the judiciary must be preceded by information on the use by the courts of technology-based tools, referred to in legal science as *LegalTech* tools, which already today also include artificial intelligence. The integration of technology into the legal sector, often referred to precisely as *LegalTech*, has been a gradual process. Therefore, it should be noted here that it is now possible to speak of at least three levels of *LegalTech* tools in the judiciary. *LegalTech* 1.0 refers to technology, including software that supports the activities of lawyers as professionals. Thus, it refers to the long-established IT systems for the organisation and operation of court secretariats, document circulation, legal information systems or certain services available online, such as videoconferencing, online communication with the courts or even online hearings. *LegalTech* 2.0 is already a much more advanced technology, not only supporting the work of judges and clerks, but also replacing people, where, within the justice system, it is possible to speak, among other things, of the automation of certain activities. Finally, *LegalTech* 3.0 are solutions that aim not so much at automation and replacing humans (which, however, is not excluded), but at the possibility of technological solutions to make

⁵²⁵ Andre Vasconcelos Roque and Lucas Braz Rodrigues Dos Santos, 'Artificial Intelligence in Making Judicial Decisions: Three Basic Premises' (2021) 22 *Revista Eletronica de Direito Processual* 58.

⁵²⁶ Papp, Krausz and Gyuranecz (n 11) 272 ff.

⁵²⁷ Townend and Magrath (n 381).

autonomous decisions, which is primarily related to the development of artificial intelligence.⁵²⁸

Each of the *LegalTech* tools, no matter at what level, has an impact on judicial efficiency. This will be the subject of the following analysis in order to show how, from software supporting judges in the judicial world, the use of new technologies is expanding and, one would think, is slowly moving towards potentially (for now) replacing them,⁵²⁹ towards autonomous judicial decision-making by AI. This chapter will therefore examine the potential of artificial intelligence in the judiciary, including in the area of autonomous judicial decision-making.

4.2. LegalTech tools to support the judiciary. Digitalisation and the move towards artificial judiciary in selected countries

There is no doubt that in individual countries, including Germany, Spain or Poland, technological tools have had a significant impact on the daily functioning of the legal services market, including the judiciary, for a long time. There are many manifestations of the simple application of technology, which have become increasingly complex over the years.⁵³⁰ Currently, *LegalTech* tools are considered essential tools for improving the functioning of the justice system in individual countries.⁵³¹ Without these tools, the modern judiciary would basically not be able to exist.⁵³² Over the past several years, the justice system has undergone technological modernisation. This modernisation varies from country to country, but there are also some similarities.

With the passage of time, more and more solutions have appeared in the courts, based on various IT systems with increasingly sophisticated functionalities. Their use in the laws of individual states has become the

⁵²⁸ Mariusz Załucki, 'Computers in Gowns and Wigs. Some Remarks about a New Era of Judiciary?' in Laura Miraut Martin and Mariusz Załucki (eds), *Artificial Intelligence and Human Rights* (Dykinson 2021) 13-23.

⁵²⁹ Kieffaber, Gandall and McLaren (n 35).

⁵³⁰ Charlotta Kronblad and Johanna Envall Pregmark, 'When Digitalization Hit the Court: Strategizing to Turn Turbulence into Opportunities' (2025) 12 *Journal of Professions and Organization* 1.

⁵³¹ Zbiciak (n 364) 23 ff.

⁵³² Yann Aouidef, Federico Ast and Bruno Deffains, 'Decentralized Justice: A Comparative Analysis of Blockchain Online Dispute Resolution Projects' (2021) 4 *Frontiers in Blockchain* 1.

basic standard, which is now part of the right to a fair trial, which includes the right to effective judicial proceedings, without which the functioning of the judiciary would be seriously compromised.⁵³³ The scenario of judicial modernisation that can be observed in individual states has usually consisted of one of two imaginable methods of development: regulation or deregulation of the use of new technologies in the administration of justice. Regularly these methods were combined. Often, specific solutions were developed within the existing legal order, the use of which in the judiciary was tested, or is still being tested. Only after appropriate tests were carried out was the legitimacy of their regulation considered and introduced on a large scale. The fact that new technologies were being incorporated into the judiciary therefore did not initially mean that there were regulations for their inclusion, with a definition of well-defined legal and technical criteria. Until today, in principle, not much has changed, the judiciary has become a technological area, but only in part these technologies are a matter regulated by law. Digitalisation in the judiciary has this dimension.⁵³⁴

To illustrate the scope of the application of *LegalTech* in the judiciary, by way of example, one can point to a number of solutions operating in German law. Most of these, now considered obvious, can be classified as part of the *LegalTech* 1.0 era, although some of them go much further. Indeed, Germany has long had tools in place that primarily focus on digitizing and streamlining traditional legal processes. It is pointed out that in Germany, the judiciary has embraced *LegalTech* 1.0 tools to modernize traditional proceedings, improve efficiency, and enhance access to justice.⁵³⁵ These include tools for the digitalisation of judicial proceedings, i.e. a constantly evolving path towards the digitalisation of the court process.

One of the most significant advancements in the German *LegalTech* 1.0 is the introduction of the *Elektronischer Rechtsverkehr* (ERV), the electronic court filing system. This system allows lawyers, notaries, and other legal professionals to submit legal documents to courts electronically. The ERV system was introduced as part of the *Justizkommunikationsgesetz* (Justice Communication Act) in 2009 and has since become a cornerstone of digital

⁵³³ Gerards and Glas (n 217).

⁵³⁴ Suárez Xavier (n 47) 276.

⁵³⁵ Judith Klink, *Datenschutz in der elektronischen Justiz* (Kassel University Press 2010) 9 ff.

justice administration in Germany.⁵³⁶ The ERV system reduces the reliance on paper-based submissions, streamlines communication between legal professionals and courts, and accelerates the processing of cases. Another example of the use of technology is the fact that German courts have adopted case management software to organise and track the progress of cases. These systems enable judges and court staff to manage case files, schedule hearings, and monitor deadlines more efficiently. For example, the federal states have created the *Justizportal*, a centralised platform for accessing case-related information and managing workflows. Furthermore, the transition from paper-based court files to electronic files, known as *E-Akte*, is a hallmark of *LegalTech* in Germany. The *E-Akte* system allows courts to digitise, store, and manage case-related documents electronically. This innovation has improved the accessibility of case files for judges and court staff, enabling them to retrieve and review documents more efficiently.⁵³⁷

There are also solutions enabling the public to access information on the activities of the judiciary, such as the aforementioned *Justizportal*, whose tasks include informing citizens about court proceedings, application requirements and the status of cases, thereby increasing transparency and accessibility and enabling citizens to navigate the legal system more efficiently. In the wake of the COVID-19 pandemic and its aftermath, the use of video conferencing tools in the German judiciary has grown significantly. These tools enable remote hearings, witness testimonies, and consultations, reducing the need for physical presence in courtrooms. The use of video conferencing in civil proceedings is governed by § 128a of the German Code of Civil Procedure (*Zivilprozessordnung* - ZPO). In criminal proceedings, on the other hand, § 247a of the German Code of Criminal Procedure (*Strafprozessordnung*) permits the use of video conferencing for witness testimonies under specific conditions. Interestingly, video conferencing is frequently used to enable prisoners to participate in court hearings without being transported to the courtroom. § 232 of the German Code of Criminal Procedure allows for the use of video conferencing in such cases. This area, i.e. the area of remote trials, is well developed in Germany.⁵³⁸

⁵³⁶ Thorsten Eidenmüller, Tobias Lembach and Andreas Musmann, 'Digitalization in the Legal System' (2020) 39 *Humanum* 37.

⁵³⁷ Nicolai Dose and Leon Arvid Lieblang, *Einführung der elektronischen Akte in der Justiz* (Materna Information & Communications 2020) 10 ff.

⁵³⁸ Martin Fries, 'Die vollvirtuelle Verhandlung - Quo vadis, § 128a ZPO?' (2020) 2 *Zeitschrift für das gesamte Verfahrensrecht* 27.

While *LegalTech* 1.0 represents a significant step forward, the ongoing development of more advanced technologies, such as artificial intelligence and blockchain, promises to further revolutionise the legal landscape in Germany. The German judiciary is already using more advanced tools today, including those based on artificial intelligence. Moving beyond the digitalisation inherent in *LegalTech* 1.0 systems, AI-powered tools are already revolutionising legal research and case outcome prediction as part of *LegalTech* 2.0. These tools analyse vast amounts of legal data, including case law, statutes, and legal literature, to provide judges and legal professionals with insights and recommendations. German law is aware of tools that are still the subject of pilot projects, whose purpose is, among other things, precisely to support adjudicators, such as tools: FRAUKE, OLGA or FRIDA.

The FRAUKE system (*FRANKfurter Urteils- Konfigurator, Elektronisch*) has been developed at the District Court of Frankfurt am Main in cooperation between computer scientists and judges to better manage the large number of incoming air passenger rights proceedings. The system is able to automatically extract relevant case data from the pleadings, such as departure and arrival airports or the distance of the flight, which are relevant for compensation settlements for delayed or cancelled flights.⁵³⁹ This avoids tedious copying and pasting of data by judges. In turn, the basis for the operation is a pre-trained basic model, which has then been adapted to the language used in these procedures. Indeed, artificial intelligence models can be trained, which means a process in which a human ‘teaches’ the algorithm.⁵⁴⁰

The OLGA system (*Ober Landes Gerichts-Assistent*), on the other hand, makes it possible to search for similar cases involving the use of diesel engines and related infringements of environmental standards (exhaust gas standards), primarily with a view to identifying them together.⁵⁴¹ The FRIDA system (*Frankfurter Regelbasierte Intelligente Dokumentenerstellungs - Assistenz*),⁵⁴² on the other hand, makes it possible in traffic offence cases to read the relevant data from files and, among other things, automatically

⁵³⁹ Bettina Mielke, ‘Künstliche Intelligenz in der Justiz’ (2023) 4 LegalTech.de 4.

⁵⁴⁰ Christian Rupp, ‘Wie der öffentliche Sektor KI schon einsetzt’ (2023) 45 Innovative Verwaltung 29.

⁵⁴¹ Mielke (n 539) 5 ff.

⁵⁴² Thomas MJ Möllers, ‘Die Bedeutung von Sprachmodellen wie ChatGPT am Beispiel des Savigny’schen Auslegungskanon’ in Susanne Hähnchen (ed), *Juristische Methodenlehre und Digitalisierung* (Universitätsverlag Potsdam) 61.

create draft judgments. Each of these systems uses machine learning methods to a greater or lesser extent and is able to suggest specific solutions.⁵⁴³

It should be recalled that machine learning is one of the most rapidly developing areas of artificial intelligence.⁵⁴⁴ It is a technology that facilitates, among other things, the interrogation of gigantic databases according to certain preconceived assumptions. Such systems are able to improve themselves on the basis of databases (experience) and thus acquire new knowledge. In this way, artificial intelligence systems can adapt to the results of previous performance, taking into account new data.⁵⁴⁵ Machine learning is a consequence of the development of the idea of artificial intelligence and methods for its practical implementation. It concerns the development of software used especially in innovative technologies and industry. Appropriate algorithms are supposed to allow software to automate the process of acquiring and analysing data to improve and develop its own system.⁵⁴⁶ Machine learning continues to develop and find new practical applications. The number of possible applications is extremely vast and it is foreseeable that in the future every aspect of technology will include some implementation of machine learning algorithms. This could also apply to legal systems, including those used in the judiciary.⁵⁴⁷

In simple terms, the process involves finding a pattern in the data provided, possibly further extending the pattern.⁵⁴⁸ By enabling computers to learn from data and make predictions or decisions without explicit programming, machine learning can enhance efficiency, accuracy, and fairness in legal processes.⁵⁴⁹ This is where the process just mentioned occurs, referred to as training artificial intelligence, which, with the help of the user, can learn to recognise patterns and then make predictions or perform various tasks. Training in this case involves providing the artificial intelligence system

⁵⁴³ Mielke (n 539) 6.

⁵⁴⁴ Nadia Maccabiani and Anna Podolska, 'How Artificial Intelligence Learns: Legal Aspects of Using Data in Machine Learning' (2024) 65 *Gdańskie Studia Prawnicze* 45.

⁵⁴⁵ Polo (n 126) 64 ff.

⁵⁴⁶ Miranda Bonilla (n 1) 715 ff.

⁵⁴⁷ Saavedra vera, Jáuregui Bustamante and Arista Bustamante (n 50) 80 ff.

⁵⁴⁸ Maciej Świtała, *Analysis of the Effectiveness of the Polish Judicial System Using Machine Learning Tools* (Uniwersytet Warszawski 2024) 148 ff.

⁵⁴⁹ Philipp Hacker, 'A Legal Framework for AI Training Data — from First Principles to the Artificial Intelligence Act' (2021) 13 *Law, Innovation and Technology* 257.

with a large amount of data. This enables technical systems to perceive their environment, deal with what they perceive and solve problems, undertaken towards the achievement of a specific goal. The computer thus receives the data, processes it and reacts.⁵⁵⁰

At the same time, machine learning has some drawbacks, which include the fact that it will only be correct if it operates on correct data. Biased or incomplete data can lead to unfair or inaccurate applications of this technology.⁵⁵¹ It has also been pointed out that machine learning models, particularly deep learning models (i.e. models based on deep neural network technology to improve, among other things, automatic natural language processing), are '*black boxes*' that are difficult to interpret.⁵⁵² This lack of transparency can undermine trust in judicial decisions. '*Black box*' is a term used in the field of artificial intelligence to describe systems that operate in a way that is incomprehensible, sometimes also to their creator.⁵⁵³ This is the reverse of the so-called '*glass box*', an approach to AI based on making the creation process of artificial intelligence as transparent as possible.⁵⁵⁴ On the other hand, another branch of AI is also slowly developing, known as explainable AI, i.e. artificial intelligence whose operating principles are understandable to humans. It is precisely in such transparent and explainable systems that the future of AI in the judiciary can be seen, and an attempt can be made to build citizens' trust on them, which will be an extremely serious factor in the possible success of such solutions in practice.⁵⁵⁵

This is important insofar as the German systems indicated are not based on so-called explainable AI technology, although they are among the transparent and efficient rule-based tools for legal document creation. Rule-

⁵⁵⁰ Simone Grassini and Mika Koivisto, 'Artificial Creativity ? Evaluating AI Against Human Performance in Creative Interpretation of Visual Stimuli' (2025) 41 International Journal of Human-Computer Interaction 4037.

⁵⁵¹ Cameron F Atkinson, 'ChatGPT and Computational-Based Research: Benefits, Drawbacks, and Machine Learning Applications' (2023) 2 Discover Artificial Intelligence 42.

⁵⁵² Nabeel Gillani and others, 'Unpacking the "Black Box" of AI in Education' (2023) 26 Educational Technology & Society 99.

⁵⁵³ Cf., however Bartosz Brożek and others, 'The Black Box Problem Revisited . Real and Imaginary' (2024) 32 Artificial Intelligence and Law 427.

⁵⁵⁴ Arun Rai, 'Explainable AI: from black box to glass box' (2020) 48 Journal of the Academy of Marketing Science 137.

⁵⁵⁵ Jinqi Lai and others, 'Large Language Models in Law: A Survey' (2024) 5 AI Open 181.

based systems, such as those mentioned, rely on a set of predefined rules and logic to make decisions or generate outputs. These rules are created by human experts and are transparent by design. Since the rules are explicitly defined, users can understand how the system arrives at its conclusions.

Other examples of the use of artificial intelligence in the German judicial system include the GOTT-BERT system, a joint project of the Bavarian Ministry of Justice and the Friedrich-Alexander-University Erlangen-Nuremberg, or the JANO system developed by the judiciary of Baden-Württemberg and Hesse. Both systems are concerned with procedures for the anonymisation of court decisions, with the aim of, among other things, increasing the publication rate of judgments, making it possible to publish basically all procedural decisions made in the courts.⁵⁵⁶ Currently, this rate is low. Systems make it possible to search procedural decisions for personal data and suggest their anonymisation. There are also projects on speech recognition, with the aim of preparing transcripts or machine translation more efficiently, as well as support for a chatbot enabling increased legal information, virtual contact with the public.

Each of these systems speeds up the functioning of the judiciary by introducing automation to streamline judicial proceedings, reduce administrative burdens, and improve decision-making. These systems automate repetitive and time-consuming tasks, such as document review, legal research, and case management, allowing judges and legal professionals to work more efficiently. Each of these systems provide quick access to relevant legal information, which also means, however, that their large-scale implementation, due to their nature, must be carefully managed to address challenges related *inter alia* to transparency, bias, and data privacy.⁵⁵⁷

The legal system in Germany emphasises that artificial intelligence in the future could be used to automate events in courtrooms. It is pointed out, among other things, that transcripts of hearings could be created from audiovisual documentation and with the help of artificial voice intelligence, thus automating court transcripts that were previously created manually. The possibility of more far-reaching solutions, including the automation of rulings, is also recognised, pointing to Chinese law and the intelligent

⁵⁵⁶ Mielke (n 539) 6.

⁵⁵⁷ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 96) 20 ff.

courts there as an example.⁵⁵⁸ However, such proposals are approached rather cautiously, seeing the value of artificial intelligence as a tool to assist rather than replace the human judge. It is also noted that automated court decisions represent the highest possible use of AI in the legal system in terms of the degree of automation of AI applications. In these application scenarios, AI is no longer limited to supporting judges but acts as a '(ro)bot judge', as an independent entity with far-reaching powers. It is recognised that the use of such decision-replacement software can help reduce the burden on the legal system to speed up proceedings, increase efficiency and reduce costs. Although there are currently no applications of (ro)bot judges in Germany and there are no such plans in the foreseeable future, as the German doctrine points out - fully automated adjudication by means of artificial intelligence is not just a future scenario, but is already being used in some prototypes in other countries.⁵⁵⁹ Automated management of legal disputes could not only relieve the burden on the courts, but also reduce the obstacles for citizens to bring disputes to court. Access to justice would thus be facilitated. For this to be possible, however, certain barriers would have to be removed, including amendments to the Basic Law.⁵⁶⁰

In general, however, from the point of view of constitutional law, technological tools, including those based on artificial intelligence, are seen in Germany rather as important tools that can support the work of jurisprudence. In doing so, reservations are formulated about various aspects of the functioning of artificial intelligence, but this does not prevent the practical further development of these systems. In doing so, the need for human control over these systems is recognised, and constitutional objections are raised where an appropriate artificial intelligence system in the administration of justice would replace a human being, particularly in the context of procedural decision-making by such a system.⁵⁶¹ A somewhat envious look is occasionally taken at some foreign countries, notably China or the United States of America, citing examples of the day-to-day use of

⁵⁵⁸ Jessica Heesen and others, *Künstliche Intelligenz und Recht. Auf dem Weg zum Robo-Richter?* (PRpetuum GmbH 2024) 19.

⁵⁵⁹ *ibid* 26.

⁵⁶⁰ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 96) 307 ff.

⁵⁶¹ Anna-Katharina Dhungel and Moreen Heine, 'Cui Bono? Judicial Decision-Making in the Era of AI: A Qualitative Study on the Expectations of Judges in Germany' (2024) 33 *Zeitschrift für Technikfolgenabschätzung in Theorie und Praxis* 14.

artificial intelligence systems in the judiciary, which is - one would think - the impetus for further discussion in this area.⁵⁶² Of course, there is no shortage of sceptical voices in science there, noting the flawed or non-transparent nature of the IT systems in which artificial intelligence operates, while also referring to systems that are already functioning in practice. However, there are also many supporters of new technologies.

Spanish law, on the other hand, long ago recognised the need to reach out more widely to technological solutions for the improvement of the justice system. Today, *LegalTech* 1.0 and 2.0 are in fact in widespread use there. Spain has implemented a comprehensive electronic court filing system, known as *LexNET*,⁵⁶³ which allows legal professionals to submit documents, access case files, and communicate with courts electronically. This system is part of the broader effort to digitalise the judiciary under the *Ley de Enjuiciamiento Civil* (Civil Procedure Law) and the *Ley de Enjuiciamiento Criminal* (Criminal Procedure Law). As in Germany, video conferencing tools have become essential in the Spanish judiciary, particularly during the COVID-19 pandemic. These tools enable remote hearings, witness testimonies, and consultations, reducing the need for physical presence in courtrooms. These tools include *Videoconferencia Judicial* and *Telejusticia*.⁵⁶⁴

The electronic interaction with the administration of justice is no longer a right, but an obligation that particularly concerns professionals in the judicial environment, such as advocates, legal counsellors, public administration lawyers and social workers. This group of specialised actors is obliged by the legislation in force (procedural laws, e.g. Article 273 of the *Ley de Enjuiciamiento Civil*) to interact electronically with the judiciary.

Ley 18/2011 of 5 July 2011, which regulates the use of information and communication technologies in the administration of justice,⁵⁶⁵ has been the framework within which many innovations introduced in the administration of justice have been developed over the last fifteen years. *Ley* 18/2011 set

⁵⁶² Heesen and others (n 558) 4 ff.

⁵⁶³ *Real Decreto* 1065/2015, de 27 de noviembre, sobre comunicaciones electrónicas en la Administración de Justicia en el ámbito territorial del Ministerio de Justicia y por el que se regula el sistema *LexNET*, BOE-A-2015-12999.

⁵⁶⁴ José Manuel Bonilla Gavilanes and Pablo María de Castro García, 'Cómo la innovación y la tecnología disruptiva pueden ayudar a mejorar la Administración de Justicia' (2021) 18 *Práctica de tribunales* 1.

⁵⁶⁵ *Ley* 18/2011, de 5 de julio, reguladora del uso de las tecnologías de la información y la comunicación en la Administración de Justicia, BOE-A-2011-11605.

out a series of rules aimed at completing the digitalisation of the Spanish judiciary. In Article 1.2, the law defines the use of information technology, ensuring access, authenticity, confidentiality, integrity, availability, traceability, protection and interoperability of the data, information and services that manages in the performance of its functions. Article 4, on the other hand, establishes a set of citizens' rights, in addition to the right and obligation to interact electronically with the administration of justice. This means that citizens have certain rights related to the use of electronic media in judicial proceedings, such as the choice of electronic communication channel, equal access to justice through electronic means, the right to information about the status of proceedings as a party to the proceedings, the right to obtain electronic copies of documents, the storage of electronic documents in electronic format by judicial authorities, or a guarantee of data security and confidentiality.⁵⁶⁶

In the face of these guarantees, a number of issues arise whose importance in the administration of justice can hardly be overestimated. In Spanish law, therefore, there is a basis for the right to formulate claims as to the shaping of the digitalisation of justice from the point of view of possible citizen expectations. This is important insofar as possible solutions should serve citizens and citizens should have confidence in their functionality. The system of digital components supporting the Spanish justice system is based on this assumption. Against this background, it should be noted that various digital solutions have been introduced in Spain, such as the *Tablón Edictal Judicial Único* (the uniform court notice board)⁵⁶⁷ or the uniform electronic auctions mechanism. There are also systems for automatic classification of documents, document search and retrieval of specific data or anonymisation of documents. Their degree of sophistication varies, and these solutions are being developed all the time, essentially used as instruments to support the judicial work of judges.⁵⁶⁸

⁵⁶⁶ María Luisa and García Torres, 'La tramitación electrónica de los procedimientos judiciales, según ley 18/2011, de 5 de julio reguladora del uso de las tecnologías de la información y la comunicación en la administración de justicia. Especial referencia al proceso civil.' (2011) 3 Revista Internacional de Estudios de Derecho Procesal y Arbitraje 1.

⁵⁶⁷ Marina Martín González, 'La comunicación edictal en el proceso civil y su digitalización a través del tablón edictal judicial único' (2022) 56 Revista General de Derecho Procesal 1.

⁵⁶⁸ Lorenzo Pérez (n 53) 20 ff.

The idea to apply artificial intelligence to the judiciary is not alien in Spain. It should be noted, for example, that the *Consejo General del Poder Judicial* in 2024 decided to set up a working group to study and analyse the impact of artificial intelligence on the performance of jurisdictional functions.⁵⁶⁹ Such work had, in fact, already been undertaken within this body, where, with regard to jurisdictional decision-making, four main possible areas of action were pointed out, distinguishing four possible models for the use of AI in the judiciary: auxiliary, preventive, automated decision support, robotic justice.⁵⁷⁰ It was emphasised that these models are not mutually exclusive and can coexist, subject to detailed analysis.⁵⁷¹

With regard to the first of these, the auxiliary model, Spanish doctrine indicates, among other things, that artificial intelligence is particularly useful for increasing the standardisation of procedural forms, legal arguments that can be derived from descriptive statistics, percentage analysis, and the study of doctrine and case law that may be applicable in a specific case. Reference was made to the WATSON system developed by computer scientists and used, for example, in Japan, which makes it possible to obtain in a very short time a list of arguments that may be applicable to a particular case.⁵⁷² It was pointed out that it is important in this area to emphasise the assessment of the robustness of the various means of evidence assistants based on predicting and risk assessment. Algorithm-based RISCANVI⁵⁷³ or BIDARACIV⁵⁷⁴ systems were identified as examples of such assistants. The former, is used

⁵⁶⁹ Communication of the *Consejo General del Poder Judicial* of 25 September 2024, available online at: <https://www.poderjudicial.es/portal/site/cgpj/menuitem.65d2c4456b6ddb628e635fc1dc432ea0/?vgnextoid=76d00f8d8a822910VgnVCM1000004648ac0aRCRD&vgnextchannel=ea1732cd1ddaa210VgnVCM100000cb34e20aRCRD&vgnextfmt=default&vgnextlocale=es_ES> accessed 30 March 2025.

⁵⁷⁰ Judith Morales Barceló, 'El difícil equilibrio entre el régimen de los contratos de suministro de contenidos y servicios digitales y la protección de los datos personales' (2022) 59 *Revista Aranzadi de derecho y nuevas tecnologías* 1, 1-12.

⁵⁷¹ María José Cabezudo Bajo, 'Hacia la digitalización de la justicia española' in María de las Nieves Jiménez López and Leticia Fontestad Portalés (eds), *El uso de las TICs en la cooperación jurídica penal internacional: construyendo la sociedad digital del futuro* (Editorial Colex 2022) 41-61.

⁵⁷² Seunghoon Choi and others, 'Labor Law Consulting System With IBM Watson Chatbot' (2019) 20 *Journal of Digital Contents Society* 241.

⁵⁷³ Lorena Alemán Aróstegui, 'El Uso de RISCANVI En La Toma de Decisiones Penitenciarias' (2023) 44 *Estudios Penales y Criminológicos* 1.

⁵⁷⁴ Cardona (n 27) 1612 ff.

in Catalonia to measure the risk of recidivism of prisoners and to help the authorities decide on their release from prison, while the latter addresses custody issues in divorce cases.⁵⁷⁵ Spain is therefore familiar with algorithmic systems in the justice system.

The precautionary model is concerned with the existence of tools to foresee the risk of certain events of legal significance. Such events - according to local doctrine - include, for example, the insolvency of the entity in question, the likelihood of non-enforcement, the determination of damages, the risk of evasion, the risk of escape or the danger of re-offending. The Spanish VIOGEN system (*Sistema de Seguimiento Integral en los casos de Violencia de Género*), designed to monitor and protect victims of gender-based violence, is mentioned as an example of the application of this type of model.⁵⁷⁶

The model of automated decision support, which has been assessed more than once in Spanish academia as possible for progressive implementation, has also been identified as an interesting area of impact of artificial intelligence on the judiciary. The doctrine proposes, among other things, to use it for jurisdictional decision-making in cases involving simple claims, with a low rate of litigation, repetitive and of little economic importance, to be assessed, on appeal, by a traditional judge. Indeed, in the case of highly repetitive disputes, artificial intelligence - according to a view also emerging in Spanish academia - seems to be a remedy for the shortcomings of the judiciary, allowing for operational procedural efficiency, enabling efficient visions of the judicial proceedings.⁵⁷⁷

As a final step in the development of the application of artificial intelligence in the judicial decision-making process, according to positions found in the Spanish science, the spread of so-called (ro)bot judges is envisaged. Three possible models of such (ro)bot judges are mentioned in particular: (1) the doctrinal judge, which, starting from a database containing case law, will combine automatic learning techniques and search trees; (2) the

⁵⁷⁵ David Vallespín Pérez, 'Robotización de la valoración de la prueba en el proceso civil español' in David Vallespín Pérez and José María Asencio Gallego (eds), *Inteligencia Artificial y Proceso: eficiencia vs garantías* (Juruá 2023) passim.

⁵⁷⁶ Noemí Jiménez Cardona, 'Aplicación de la inteligencia artificial en la toma de decisiones jurisdiccionales (España)' (2023) 16 Revista Quaestio Iuris 1612, 1619.

⁵⁷⁷ Cf. Federico Bueno de Mata, 'Del metaverso a la metajurisdicción desafíos legales y métodos para la resolución de conflictos generados en realidades virtuales inmersivas' (2022) 7 Revista de privacidad y derecho digital 19, 19-23.

regulatory judge, capable of learning according to the rules in force, involving a legal coding phase suitable for a programming language, as well as a second phase related to training in neural networks by means of practical cases; (3) the experienced judge, which will have to learn from cases, feeding itself with data on the case law of common courts of all instances and the case law of the Supreme Court. It is stressed that the problem today is not whether a (ro)bot can replace a judge, but whether this option will actually lead to fairer decisions. For this reason, among other things, the need for human control over artificial intelligence is emphasised, suggesting a possible shift, if any, towards a hybrid justice system, which must be somewhere between artificial justice and human justice in the future.⁵⁷⁸

Despite the doctrinal discussion, for the time being, the state of judicial practice is such that the use of artificial intelligence is not widespread. Spain is no exception when it comes to the rather restrained use of AI-based tools. Nevertheless, predictive tools are also available in practice, used to analyse judicial trends and inform policy-making. These tools use machine learning to identify patterns in judicial decisions and predict the impact of legal reforms. In use, for example, is the private platform JURIMETRIA, which analyses court decisions to identify trends in sentencing and case outcomes.⁵⁷⁹ AI-powered tools are increasingly being used in the Spanish judiciary to assist judges and legal professionals in legal research and decision-making. These tools analyse case law, statutes, and legal literature to provide insights and recommendations.⁵⁸⁰ This will certainly be the way forward for the Spanish judiciary.

However, Spanish legal academia has been debating for some time now the possibilities of applying artificial intelligence to the judiciary. A number of concerns are highlighted in this context, particularly regarding the constitutional guarantees of the right to an independent court with independent and impartial judges.⁵⁸¹ There are many proponents of such systems who observe foreign trends and wonder about the possibility of

⁵⁷⁸ Sonia Calaza López and Mercedes Llorente Sánchez-Arjona, *Inteligencia artificial legal y administración de justicia* (Aranzadi 2022) 25.

⁵⁷⁹ Dierle Nunes and Fernanda Amaral Duarte, 'Jurimetria e tecnologia: diálogos essenciais com o direito processual' (2020) 299 *Revista de Processo* 407.

⁵⁸⁰ Jordi Gimeno Beviá, 'Los sistemas de jurimetria en tiempos de eficiencia procesal y de legal techretos, oportunidades y riesgos' (2024) 63 *Revista General de Derecho Procesal* 1.

⁵⁸¹ Pérez (n 575) *passim*.

implementing appropriate solutions in Spain as well.⁵⁸² The discussion in this regard is endless, which is related, it may be thought, to the significant influence of the doctrine and practice of other countries, especially Ibero-American countries, applying artificial intelligence tools in the judiciary much more boldly than is the case in continental Europe. Many authors recognise the possible drawbacks of such systems, but this does not prevent further development work in this area. The future of AI in Spanish courts is likely to be shaped by several key trends and developments, reflecting broader global advancements in legal technology while addressing Spain's specific legal and cultural context.⁵⁸³

The Polish legislator has also taken the path of adapting the image of the Polish judiciary to modern requirements, especially in the context of the technological revolution. In recent years, a number of IT projects have been initiated in Poland aimed at streamlining the course of judicial proceedings, based, inter alia, on *LegalTech* 1.0 and 2.0 technologies.⁵⁸⁴ Apart from obvious measures, such as equipping courts with legal information systems, five significant projects have been implemented in this country, among others, which were to influence the efficiency and quality of jurisprudence. These included the ICT system supporting the electronic writ-of-payment (*Elektroniczne Postępowanie Upominawcze* - EPU), the electronic protocol in common courts - civil and misdemeanour cases (*E-protokół*), the Electronic Confirmation of Receipt (*Elektroniczne Potwierdzenie Odbioru* - EPO), the Random Case Allocation System (*System Losowego Przydziału Spraw* - SLPS)⁵⁸⁵ or the Information Portal of Common Courts (*Portal Informacyjny* - PI). Each of these projects was aimed at influencing the efficiency of court proceedings and used IT tools to achieve this goal. The legislator's intention was to speed up the examination of certain court cases and at the same time to reduce the costs of proceedings. The solutions introduced as part of the *LegalTech* tools were designed to serve this purpose.⁵⁸⁶

⁵⁸² Polo (n 126) 53 ff.

⁵⁸³ Miren Josune Pérez Estrada, *Fundamentos jurídicos para el uso de la inteligencia artificial en los órganos judiciales* (Tirant lo Blanch 2022) 25 ff.

⁵⁸⁴ Jacek Gołaczyński, 'Informatyzacja postępowania cywilnego w Polsce. Wnioski de lege lata' in Bogdan Fischer, Adam Pązik and Marek Świerczyński (eds), *Prawo sztucznej inteligencji i nowych technologii*, vol 2 (Wolters Kluwer 2022) 15 ff.

⁵⁸⁵ The compatibility of this system with the EU standard of the right to a fair trial has recently been the subject of preliminary questions in case C-159/25 pending before the CJEU.

⁵⁸⁶ Zbiciak (n 364) 23 ff.

Two of these projects are worth mentioning. The first, i.e. electronic writ-of-payment proceedings is a type of proceedings currently provided for in the Polish law in Articles 505[28]-505[39] of the *Kodeks postępowania cywilnego*. This type of proceedings has been established as separate proceedings in the form of a payment claim in cases where the facts are not complicated and do not require the collection of evidence. The e-court was established as a division of one of the common courts. In turn, the course of the proceedings has been constructed in such a way that the party who files a claim communicates with the e-court electronically (through a dedicated system).⁵⁸⁷ After registering on the platform www.e-sad.gov.pl, the plaintiff can file a payment claim and other pleadings with the e-court. The defendant can choose to communicate with the e-court electronically or traditionally. An order for payment issued in the electronic writ-of-payment procedure, on the other hand, has a purely electronic form. In the context of the functioning of this proceedings, it is worth noting the fact indicated by the doctrine that in this procedure, when issuing rulings, from a time perspective, the judge devotes between 2 and 5 minutes to a given case (assuming that all working time is used for court activities).⁵⁸⁸ The available statistics (which are quite old now) show, for example, in the group of judges operating this system, on average there were 48 700 litigation activities per person per year in 2015, 49 600 in 2016 and 54 200 in 2017 respectively, which meant about 195-217 litigation activities per day. In the following years, as can be assumed, the statistics did not particularly differ from those of 2015 to 2017. This, in turn, seems to be a step towards automation. For it is impossible to consider that such a person analyses a case comprehensively. Thus, if assessed in the context of the standards of the right to a fair trial, the potential adjudication of a case by artificial intelligence does not seem to violate this right to any greater extent (if one can talk about violations in such a case at all, which will be discussed later).⁵⁸⁹ In other words, if the Polish legal system allows for such a solution involving human judges, it would seem that there is even more room for automation resulting from the use of (ro)bot judges, as will be discussed further.

⁵⁸⁷ Sławomir Cieślak, 'Elektroniczne postępowanie upominawcze' (2010) 7 *Monitor Prawniczy* 359.

⁵⁸⁸ Cf. Maria Siemaszkiewicz, 'Automatyzacja postępowania cywilnego - zagadnienia wybrane' (2017) 1 *Prawo Mediów Elektronicznych* 40.

⁵⁸⁹ Maria Dymitruk, 'The Right to a Fair Trial in Automated Civil Proceedings' (2019) 13 *Masaryk University Journal of Law and Technology* 27.

The Random Case Allocation System (SLPS), on the other hand, is a solution aimed at building an IT system to ensure random and even allocation of cases to judges, in proportion to the number of working days and allocation rates. In this respect, *Prawo o ustroju sądów powszechnych* was amended, where the provision of Article 47a was added.⁵⁹⁰ This provision is to constitute one of the guarantees of impartiality and equality of parties in court proceedings. It should be explained that under the previous legal status, it was up to the chief judges to determine the rules for allocation of cases to judges, court assessors and court referendaries, and it was a constant practice for cases to be allocated by the department chairman according to the order of receipt. Nowadays, the allocation is made by an IT system, the functioning of which is controversial, if only due to the lack of public access to the algorithm at the core of the system.⁵⁹¹ This system, the first fully automated system in the Polish judiciary, can be classified as *LegalTech 2.0* tool. It is a pity, however, that despite the impact of such algorithms on human rights, including on the assessment whether an individual is guaranteed the right to a fair trial, in Poland no comprehensive policy guaranteeing the safe implementation of such solutions has been developed so far. When knowledge about how technological tools work remains largely unknown, doubts arise and the principles behind such solutions begin to be questioned. This is undesirable.

It can also be mentioned that in Poland videoconferencing was introduced in courts during the COVID-19 pandemic,⁵⁹² which happened as a result of the entry into force of Article 15zys^1 of the Act of 2 March 2020 on special measures related to the prevention, control and combating of COVID-19, other infectious diseases and crisis situations caused by them.⁵⁹³ The issue is still being refined in practice, and against it is indicated, among

⁵⁹⁰ Provision added by the *ustawa z dnia 12 lipca 2017 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw* Dziennik Ustaw 2017, item 1452.

⁵⁹¹ Cf. Jolanta Ojczyk, 'Algorytmy na usługach państwa bez nadzoru' *Prawo.pl* (14 May 2019) <<https://www.prawo.pl/biznes/algorytmy-na-uslugach-panstwa-raport-fundacji-epanstwo,414254.html>> accessed 30 March 2025.

⁵⁹² Olga Zinkiewicz-Będźmirowska, 'Rozprawy zdalne jako odpowiedź na wyzwania nowoczesnego sądownictwa' [2024] *Przegląd Prawa Handlowego* 43.

⁵⁹³ *Ustawa z 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych*, Dziennik Ustaw 2020, item 374.

other things, as one of the ideas to increase the organisational capacity of the judiciary.⁵⁹⁴

In contrast, so far Poland has not introduced more advanced systems in the judiciary, especially in the context of *LegalTech* 3.0, although these have been suggested repeatedly in the doctrine.⁵⁹⁵ There are also no developed private initiatives in the field of predictive jurisprudence. The only more comprehensive proposal is related to the activities of the Electronic Arbitration and Mediation Centre (*Elektroniczne Centrum Arbitrażu i Mediacji*) at the Association of Notaries of the Republic of Poland (*Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej*) in Warsaw, where an electronic arbitration court and an electronic mediation centre are run, operating on the Ultima RATIO platform,⁵⁹⁶ which uses algorithms. However, it is not a comprehensive solution based on AI tools. Recently, also the ENOIK project has emerged, which is an algorithmic arbitration court, where arbitrators in the process of resolving legal disputes are supported by an algorithm trained on the basis of hundreds of thousands of cases recognised by common courts.⁵⁹⁷

On the other hand, the Polish literature on the subject has repeatedly recognised the potential of artificial intelligence in this area, emphasised the prospects related to it, and expected an increase in the efficiency of court proceedings with its application.⁵⁹⁸ Concerns have also been expressed about artificial intelligence tools, including some reservations about the constitutionality of solutions based on artificial intelligence in the context,

⁵⁹⁴ Cygan (n 452).

⁵⁹⁵ This has been reported by, e.g.: Berenika Kaczmarek-Templin, 'Sztuczna inteligencja (AI) i perspektywy jej wykorzystania w postępowaniu przed sądem cywilnym' (2022) 31 *Studia Prawnicze. Rozprawy i Materiały* 61; Szanciło and Stępień-Załucka (n 156); Flaga-Gieruszyńska (n 11); Marcin Kamiński, 'Podmiot kompetencji administracyjnej... w zautomatyzowanych procesach stosowania prawa na tle problematyki legitymacji prawno- -demokratycznej delegowania kompetencji na systemy sztucznej inteligencji i odpowiedzialności prawnej za ich działania lub zaniech' (2024) 53 *Prawo i Wiąż* 239; Michał Kowalski, 'The Impact of Artificial Intelligence on the Future Functioning of Administrative Courts' (2024) 53 *Prawo i Wiąż* 173; Stępień-Załucka, 'LegalTech 3.0. Some Reflections on the Constitutional Prerequisites for the Use of Artificial Intelligence in the Administration of Justice' (n 155).

⁵⁹⁶ 'UltimaRatio.pl' (2025) <<https://ultimaratio.pl/>> accessed 30 March 2025.

⁵⁹⁷ 'ENOIK.pl' (2025) <<https://enoik.pl/>> accessed 30 March 2025.

⁵⁹⁸ Patrycja Dolniak and others, *Sztuczna inteligencja w wymiarze sprawiedliwości* (Wolters Kluwer 2024) 221 ff.

in particular, of the right to a fair trial. The discussion in this regard is still present in Poland.⁵⁹⁹ Despite various reservations, artificial intelligence systems are perceived by Polish science to be functioning in other places in the world, especially in countries in North and South America and Asia.

The Polish academia emphasises that the application of artificial intelligence in the judiciary may have various dimensions. The possibility of adjudicating cases with the use of AI is approached with increasing attentiveness, raising well-known objections in this respect, including those concerning the constitutional conditions of the administration of justice, where various legal solutions known to foreign practice are subject to potential evaluation.⁶⁰⁰

Therefore, as can be seen, legislators in Germany, Spain or Poland observe global trends in *LegalTech* 1.0 and 2.0 tools, which is not particularly different from the attitude of other European countries. In European countries, artificial intelligence is a field in which there is a certain amount of restraint, which can be assumed to stem from a desire to observe how some foreign solutions will work in practice in the long term, whether their functionality will develop, as will their ability to solve problems that arise on an ongoing basis in the judiciary. In this respect, these countries are primarily following American and Asian developments, technological ‘innovations’, which can perhaps be adapted in the future, emulated into the domestic law of European countries.

However, it seems that, despite this reticence, the common feature of the systems discussed above is the significant technological transformation of the justice system carried out in recent years, based primarily on the foreign models. Artificial intelligence, although slowly being implemented in the justice system, has not yet found its proper place. Perhaps the reason for this is the indicated distrust of such systems, perhaps the unsuccessful foreign experience, or perhaps the desire for a gradual transformation. It is

⁵⁹⁹ Marcelina Lech, ‘Możliwość wykorzystywania narzędzi opartych o sztuczną inteligencję w postępowaniu karnym w Polsce’ (2023) 17 Wrocławskie Studia Erazmiańskie 209; Franciszek Skawiński, ‘Use of ICT Systems in Handling Monetary Civil Claims in Poland and England (United Kingdom): A Comparative Analysis’ (2023) 105 Acta Universitatis Lodziensis. Folia Iuridica 37; Rafał Blicharz, ‘Sztuczna inteligencja w mediacji w sprawach cywilnych i gospodarczych’ (2024) 909 Przegląd Ustawodawstwa Gospodarczego 2; Joanna Marszałek and Marek Skwarcow, ‘Użycie sztucznej inteligencji w postępowaniu karnym’ (2025) 35 Przegląd Sądowy 54.

⁶⁰⁰ Szanciło and Stępień-Załucka (n 156).

therefore worthwhile at this point to look at the solutions that are already well-known worldwide, that introduce new trends and provoke further discussion about the applications of artificial intelligence in the judiciary. Although AI-based mechanisms supporting judges, whose availability and scope of application are constantly expanding, are becoming increasingly common in judicial practice, there are growing calls for further barriers to be overcome, which may lead in the future, at least in some cases, to traditional judges being replaced by (ro)bot judges using AI skills. Such barriers, at least from a traditional point of view, have already been crossed in some American and Asian systems.

4.3. Artificial intelligence in the judiciary based on selected examples known from the practice

The impetus to explore this area, after it had been intuitively established in many legal systems that artificial intelligence could streamline court proceedings and be helpful in this regard, was certainly provided by the first research results and experiments carried out about a decade ago. In the course of the research carried out by lawyers and computer scientists, it turned out that artificial intelligence and its known applications from other areas of the economy were fit for use in the judicial field.⁶⁰¹ Despite the fact that such a possibility was often disregarded until more than a decade ago, it was decided to investigate judicial jurisprudence on the basis of the functionality of artificial intelligence.⁶⁰² Obviously, this would not have been possible if judgements had not been digitalised earlier. As courts started to publish judgements online, big data analysis (i.e. large-scale statistical analysis of case law and machine learning) within the legal domain became possible.⁶⁰³

In the circumstances of the availability of digital versions of judgments, often appropriately grouped, characterised and templated,⁶⁰⁴ ideas of

⁶⁰¹ Junyun Cui, Xiaoyu Shen and Shaochun Wen, 'A Survey on Legal Judgment Prediction: Datasets, Metrics, Models and Challenges' (2023) 11 IEEE Access 102050.

⁶⁰² Katie Atkinson, Trevor Bench-Capon and Danushka Bollegala, 'Explanation in AI and Law: Past, Present and Future' (2020) 289 Artificial Intelligence 103387.

⁶⁰³ Cf. Laura Cristina Ubiali, *Big Data as a Supporting Tool for Judicial Decision-Making. A Preliminary Study with a Brazilian Judicial System* (Stockholm University 2018) 14 ff.

⁶⁰⁴ Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80 Modern Law Review 995.

predictive research based on machine learning technology have emerged.⁶⁰⁵ Based on algorithms fed with knowledge from court ruling databases, numerous attempts have been made to prove that artificial intelligence is capable of examining court cases and predicting their outcomes.⁶⁰⁶ This research has been carried out with varying degrees of intensity and success, but it cannot be passed by indifferently.⁶⁰⁷

One big surprise for many was the results of a test published in 2016, to which 584 cases pending before the European Court of Human Rights were subjected. The algorithm, after analysing the documents, predicted 79% of the decisions of this Court concerning claims under Article 3 (prohibition of torture, inhuman and degrading treatment), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights.⁶⁰⁸ The results of this test have resonated widely in the world literature and have given impetus to further research, which is also promising.⁶⁰⁹ Undoubtedly, the complexity of the matters being resolved and the complexity of the issues raised allow for an optimistic outlook on the future, given the possibility of creating an algorithm for resolving less complex cases, which are most often decided by common courts.⁶¹⁰

In explaining the results of this study, it was noted that it was possible for several reasons. It was pointed out, *inter alia*, that the judgments of the European Court of Human Rights have a distinctive structure, which

⁶⁰⁵ Haihua Chen and others, 'A Comparative Study of Automated Legal Text Classification Using Random Forests and Deep Learning' (2022) 59 *Information Processing & Management* 102798.

⁶⁰⁶ Zhiwei Fei and others, 'LawBench: Benchmarking Legal Knowledge of Large Language Models' (2023) 2309 *ArXiv* 16289.

⁶⁰⁷ Gil Semo and others, 'Prediction of Class Action Cases in the US' (2022) 2211 *ArXiv* 00582.

⁶⁰⁸ Nikolaos Aletras and others, 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective' (2016) 19 *PeerJ Computer Science* 93.

⁶⁰⁹ Masha Medvedeva, Michel Vols and Martijn Wieling, 'Using Machine Learning to Predict Decisions of the European Court of Human Rights' (2020) 28 *Artificial Intelligence and Law* 237; Joe Collenette, Katie Atkinson and Trevor Bench-Capon, 'Explainable AI Tools for Legal Reasoning about Cases: A Study on the European Court of Human Rights' (2023) 317 *Artificial Intelligence* 103861.

⁶¹⁰ Irene Benedetto and others, 'Boosting Court Judgment Prediction and Explanation Using Legal Entities' (2024) 32 *Artificial Intelligence and Law* 1.

makes them particularly suitable for a text-based analysis. Judgments are clearly divided into different sections covering these contents, which allows straightforward standardisation of the text and consequently renders possible text-based analysis. They usually contain sections such as procedure, facts, circumstances of the case, relevant law, the merits of the case, alleged violation of law, and operative provisions, where the Court announces the outcome of the case. The authors of the study therefore constructed a data set consisting of cases related to Articles 3, 6, and 8 ECHR, examining only those cases that were available in the HUDOC database⁶¹¹ in English. They removed those parts that contained adjudication considerations, making sure that the designed artificial intelligence models would not use information regarding the outcome of the case. Instead, the aim of the study was to predict whether there was a violation or non-violation in a particular case in relation to a specific ECHR standard. For this purpose, a machine learning algorithm known as Support Vector Machine was used, which involves mapping data into a multidimensional feature space in a way that allows categorisation of data points. The main assumption was that published judgments could be used to test the ability of text-based analysis to predict outcomes *ex ante*, assuming that there is sufficient similarity between (at least) certain parts of the text of published judgments and the submissions made to the ECtHR by the parties in relation to the pending cases. After the analysis, it turned out, especially on the basis of the passages of judgments referred to as ‘circumstances of the case’ (rather than ‘relevant law’), that the algorithm predicted on average 79% of adjudications.⁶¹²

These results can be understood as providing some evidence of the ECtHR’s approach to decision-making, whereby judges respond primarily to non-legal rather than legal reasons when deciding such cases. Commenting on these results, it was highlighted that, essentially, since the beginning of the 20th century, there has been a major dispute between two opposing ways of making sense of judicial decision-making: legal formalism and legal realism. Legal formalists presented a legal model of judicial decision-making, arguing that the law is rationally determined: judges either decide cases deductively, subjecting facts to formal legal rules, or use more complex legal reasoning than deduction when legal rules are insufficient to justify a particular outcome. On the other hand, legal realists have criticised formalist models,

⁶¹¹ Portal of the European Court of Human Rights, providing access to its case law, available online at: <<https://hudoc.echr.coe.int/>> accessed 30 March 2025.

⁶¹² Aletras and others (n 608) 2 ff.

insisting that judges decide cases primarily by responding to the stimulus of the facts of the case, rather than on the basis of legal rules or doctrine, which in many cases are rationally indeterminate.⁶¹³

Such an approach, while not prejudging the validity of either position, could certainly have stimulated more research into the area, as was soon to be the case. In the study published in 2020 on the case law of the same ECtHR, but on a broader scope than the study described above (more cases - 8 400, a wider range of rights and freedoms under the ECHR - Articles 2, 3, 5, 6, 8, 10, 11, 13 and 14), the algorithm predicted the outcome of cases with similar efficiency - 75% on average (it was an algorithm based on the same machine learning technology - Support Vector Machine). Thus, it was once again shown that case law can be treated as quantitative data to predict case outcomes, indicating in the conclusions that further research is needed to improve existing solutions.⁶¹⁴

A similar test, the results of which were published in 2017, was carried out in the United States of America. Artificial intelligence analysed more than 28 000 cases pending before the U.S. Supreme Court on the basis of an algorithm created. Cases decided between 1816 and 2015 were studied. The algorithm was able to predict 70.2% of the decisions.⁶¹⁵ In doing so, the spectrum of cases was much broader than the test for applying the standards of the European Convention on Human Rights to specific cases. The authors of the study based it on data from the Supreme Court Database. They noted that in this database each case contains as many as two hundred and forty variables, including chronological variables, case background variables, justice-specific variables, and outcome variables. Using a machine learning method referred to as random forest, which involves constructing multiple decision trees during learning and generating a class that is the dominant of the classes or a predictable average of the individual trees, the authors demonstrated once again the suitability of the algorithms for predicting judicial decisions.⁶¹⁶

⁶¹³ *ibid* 11 ff; Laura Miraut Martín, *La implicación del concepto de probabilidad en el Derecho* (Ediciones Laborum 2023) 41 ff.

⁶¹⁴ Medvedeva, Vols and Wieling (n 609) 263.

⁶¹⁵ Cf. Daniel Martin Katz, Michael J Bommarito II and Josh Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States' (2017) 12 Plos One 1.

⁶¹⁶ *ibid*.

This was also one of the further impulses, a motivation to continue searching for alternative methods of dispute resolution using AI. It should therefore come as no surprise that this experiment also attracted considerable interest in scientific circles.⁶¹⁷ In principle, each of the above experiments has been analysed many times in the literature on the subject. The conclusions drawn from these analyses usually boil down to the need for further exploration of this area.⁶¹⁸

There are also some lesser-known studies where, for example, in criminal homicide cases, the computer predicted the outcome in a manner analogous to a human in most cases. This was the case, for example, in Brazil, where 98% of the outcome of homicide court cases was predicted on the basis of the regression tree method, an algorithm that analyses relationships between variables and is used to predict the value of the target variable.⁶¹⁹ The results of this research indicated that algorithms such as the one used in the study have the ability to investigate legal concepts of law, revealing specific patterns very effectively. This method has already been used in many other countries, including Italy and Zimbabwe, demonstrating that although the legal systems of individual countries are extremely different around the world and operate in different languages, they share similar characteristics that can be effectively measured by appropriate algorithms.⁶²⁰

The above tests were primarily based on a natural language processing method, where an artificial intelligence predictive model operating on text data was used. In such a method, a system that understands natural language (used in human communication) transforms natural language samples into more formal symbols that are easier for computer programmes to process.⁶²¹

⁶¹⁷ Cf. Haoxi Zhong and others, 'Legal Judgment Prediction via Topological Learning' (2018) 1 Proceedings of the 2018 Conference on Empirical Methods in Natural Language Processing 3540, 3540-3549.

⁶¹⁸ Xu (n 49).

⁶¹⁹ Vithor Gomes Ferreira Bertalan and Evandro Eduardo Seron Ruiz, 'Predicting Judicial Outcomes in the Brazilian Legal System Using Textual Features' (2020) 2607 CEUR Workshop Proceedings 22.

⁶²⁰ Daniele Licari and Giovanni Comandè, 'ITALIAN-LEGAL-BERT Models for Improving Natural Language Processing Tasks in the Italian Legal Domain' (2024) 52 Computer Law & Security Review 105908.

⁶²¹ Wentao Deng and others, 'Syllogistic Reasoning for Legal Judgment Analysis' in Houda Bouamor, Juan Pino and Kalika Bali (eds), *Proceedings of the 2023 Conference on Empirical Methods in Natural Language Processing* (Association for Computational Linguistics 2023) 13997-14008.

Then, after appropriate analysis, the natural language generating system converts the information stored in the computer database into a language that is easy for humans to read and understand. Using this method, in the above cases, extensive amounts of data (in each case) were analysed to accurately predict the actual outcome. The results of the tests are interesting in that a large proportion of the errors concerned similar legal standards, where only the nuances of the case law determined a different outcome in reality.⁶²² It should therefore undoubtedly be noted that a system dealing with the automation of the analysis, comprehension, translation and generation of natural language by a computer in the context of the processing of specific judgments handed down in reality could be an interesting starting point for further research.⁶²³ Certainly, in turn, such experiments open up the discussion of whether the traditional judge can be replaced by a computer. For many, this seems tempting, although for obvious reasons it is not yet (and may never be) the standard that individual legislators are aiming for. Nonetheless, in the academic discussion, increasingly bold theses are being formulated according to which, at least in certain categories of cases, this seems possible.⁶²⁴

Tests such as those indicated above show that artificial intelligence can at least be an interesting tool to assist in the administration of justice, and may perhaps be one day able to replace 'real' judges, human judges. This idea is, in fact, not entirely new, as already in the 1970s there were concepts related to this.⁶²⁵ A few years ago, for example, there was a project from Estonia, where the first steps were taken with a mechanism that would assist judges by collecting certain data necessary to decide a case and analysing it in order to decide the case in the most fair manner.⁶²⁶ This mechanism was intended,

⁶²² Chaojun Xiao and others, 'CAIL2018: A Large-Scale Legal Dataset for Judgment Prediction' (2018) 1807 ArXiv 02478.

⁶²³ Yi Feng, Chuanyi Li and Vincent Ng, 'Legal Judgment Prediction via Event Extraction with Constraints' in Smaranda Muresan, Preslav Nakov and Aline Villavicencio (eds), *Proceedings of the 60th Annual Meeting of the Association for Computational Linguistics*, vol 1 (Association for Computational Linguistics 2022) 648-664.

⁶²⁴ Cf. Tania Sourdin, 'Judge v Robot? Artificial Intelligence and Judicial Decision-Making' (2018) 41 UNSW Law Journal 1114; Załucki (n 528) *passim*.

⁶²⁵ Anthony D Amato, 'Can/Should Computers Replace Judges?' (1977) 11 Georgia Law Review 1277.

⁶²⁶ Eric Niiler, 'Can AI Be a Fair Judge in Court? Estonia Thinks So' (25 March 2019) <<https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>> accessed 30 March 2025.

among other things, as a response to the courts' inability to cope with the growing number of cases, therefore one of the motivations for working on this solution was the desire to improve the efficiency and effectiveness of resolving cases. Its first task was to resolve the so-called minor cases (small claims), where the value of the subject of the dispute did not exceed the amount of EUR 7 000.⁶²⁷ Traditional judges (humans) were not involved in these adjudications. The system was based on the parties to a given dispute providing documents supporting their positions, which were analysed by an algorithm, which then issued a payment order. Only appeals against this decision were reviewed in the traditional manner before a human judge. This was certainly a further step towards taking seriously solutions of this kind based on artificial intelligence, where the human-judge involvement is minor (minimised).⁶²⁸ The Estonian solution, still in force, is part of the Estonian strategy of digitalizing public actions, and the first results of using it also appear promising, although it is not entirely based on the concept of a (ro)bot judge.⁶²⁹

This solution was not, however, the first European approach to automation in court proceedings. As early as 1999, the first European project - called 'the *First European Seminar on Court Technology*' (led by the Research Institute on Judicial Systems (*Istituto di Ricerca sui Sistemi Giudiziari*) of the National Research Council of Italy (*Consiglio Nazionale delle Ricerche*)⁶³⁰ - had emerged with the task to describe the current and planned use of court

⁶²⁷ Papp, Krausz and Gyuranecz (n 11) 8 ff.

⁶²⁸ Tanel Kerikmäe and Evelin Pärn-Lee, 'Legal Dilemmas of Estonian Artificial Intelligence Strategy: In between of e-Society and Global Race' (2021) 36 *AI & Society* 561.

⁶²⁹ Which, incidentally, was pointed out in the public discussion by the authorities there: 'As there have been a lot of questions relating the topic of AI Judge, we have to explain that the article about Estonian project of designing a 'Robot/Judge' in *Wired* from 25th of March 2019, is misleading. There hasn't been that kind of project or even an ambition in Estonian public sector. The Estonian Ministry of Justice does not develop AI robot judge for small claims procedure nor general court procedures to replace the human judge. We are still searching for ICT means to make court's workload, including administrative burden more bearable' Cf. <<https://www.justdigi.ee/en/news/estonia-does-not-develop-ai-judge>> accessed 30 March 2025.

⁶³⁰ The research project was led by the Research Institute on Judicial Systems of the National Research Council of Italy in partnership with the Ministry of Justice of France, Centre for Information, Communication and Law at the Leiden University, The Netherlands, Judicial Documentation Centre, General Judicial Council of

technology in the European Union, to identify, discuss and disseminate the most effective and successful applications, and to develop a network of court technology researchers, practitioners and policymakers, leading to the scheduling of periodical European court technology conferences. The final seminar of the research was held in Bologna (Italy), in September 2000.⁶³¹ The research showed that a few countries, such as Finland, Norway, and Austria, had designed electronic case management systems and procedural rules for the exchange of legal documents generated both by the parties and the courts, in both civil and criminal cases. Some other countries, such as Italy, were struggling with the so-called ‘*Trial online*’ for civil cases, and a criminal case management system that allowed a limited secure connection between prosecution and the courts.⁶³²

A few years later, in 2003, the same Italian research institute initiated another research project. It enabled the collection of up-to-date information on electronic exchange of judicial data, i.e. the automated exchange of structured data between different organisations involved in the legal system. This project also resulted in a very interesting breakthrough in the development of the justice sector: ‘Money Claim Online’, based on a project implemented in England and Wales in 2002 (an online service for claimants and defendants that allows monetary claims to be filed online).⁶³³

Already at that time, the wide-ranging potential for the application of new technologies in the administration of justice was recognised, which in fact prompted various attempts to implement new technologies in individual European countries, including Belgium or the Netherlands, which were still unsuccessful at the time.⁶³⁴ Therefore, the scope of work related to the implementation of new technologies in individual countries, as well as doctrine, has been taken into account. As early as 2011, it was

Spain, Joyce Plotnikoff and Richard Woolfson, Consultants in Management, IT and the Law in Great Britain.

⁶³¹ Marco Fabri and Francesco Contini, *Justice and Technology in Europe: How ICT Is Changing the Judicial Business* (Kluwer Law International 2001) 10 ff.

⁶³² Marco Fabri, ‘From Court Automation to E-Justice and Beyond in Europe’ (2024) 15 *International Journal for Court Administration* 1.

⁶³³ Skawiński (n 599) 37 ff.

⁶³⁴ Thomas De Weers, ‘Case Flow Management Net-Project - The Practical Value for Civil Justice in the International Journal For Court Administration | October 2016 International Journal For Court Administration | October 2016’ (2016) 8 *International Journal for Court Administration* 32.

proposed to use machine learning technology to analyse case law as a tool for predicting the outcome of decisions, now known as ‘predictive justice’, and to obtain valuable data for assessing and subsequently estimating the length of proceedings.⁶³⁵

During this period, several solutions were introduced in individual European countries, including those mentioned so far for Germany, Poland and Spain. The solution used in France, for example, is also interesting. It is a software for determining severance pay amounts for dismissals without just cause.⁶³⁶ One of the reasons for seeking an algorithm-based solution in this context was to reduce excessive variability in case law. Indeed, the previous practice of the French courts in this regard was far from uniform. The introduction of an algorithm based on a variety of data has also proved to be a promising solution in this regard and a tool based on artificial intelligence was found helpful to the adjudicators of such cases.⁶³⁷

The last fifteen years have certainly been a time when solutions using new technologies have been discussed at various levels in Europe, generally leading to further research or testing of further solutions. A relevant ‘technological’ future has been recognised by, among others, the European Union, which, in the aforementioned document ‘*Study on the use of innovative technologies in the justice field*’ published in 2020, identified the use of artificial intelligence and blockchain/DLT technologies in the justice field as a priority. It may be recalled that this document identified 130 projects using innovative technologies in the justice field in EU countries, and the conclusion of this document was to propose an EU legal and policy framework for future action. The indicated transformation of the justice system was also recognised by the Council of Europe in a 2018 document – *European ‘Ethical Charter on the use of artificial intelligence in and around judicial systems’*.⁶³⁸

⁶³⁵ Marco Fabri, *L'altra e-justice. Analisi delle sentenze e durata dei procedimenti* (CLUEB) passim.

⁶³⁶ Roseline Letteron, ‘L'accès numérique au droit’ (2018) 3 *Les Annales des Mines* 68.

⁶³⁷ Pierre Cahuc, Julien Prat and Pierre Cahuc, *The Detrimental Effect of Job Protection on Employment: Evidence from France* (IZA - Institute of Labor Economics 2019) 1 ff.

⁶³⁸ Caroline Gans-Combe, ‘Automated Justice: Issues, Benefits and Risks in the Use of Artificial Intelligence and Its Algorithms in Access to Justice and Law Enforcement’ in Dónal O'Mathúna and Ron Iphofen (eds), *Ethics, Integrity and Policymaking. The Value of the Case Study* (Springer 2022) 175 ff.

The European Union has also implemented several trans-European projects, to mention the European Case Law Identifier (ECLI),⁶³⁹ the European Criminal Record Information System (ECRIS),⁶⁴⁰ and the e-Justice Communication via Online Data Exchange (e-CODEX).⁶⁴¹ The ECLI is a uniform identifier that enables to identify judicial decisions more easily. It also makes it easier to access, search for, identify, cite and link EU and national case-law. The ECRIS improves the exchange of information on criminal records throughout the EU. The e-CODEX offers a series of functionalities providing an easier (digital) way to exchange legal information between EU-countries.

The EU e-Justice strategy 2024-2028⁶⁴² mentions that the promotion of ECLI and e-CODEX access points in all member states are actions that should be taken in the following years. However, the document also indicates that specific actions relating to issues arising in the context of the digital transformation (video conferences, digital files, etc.) should be considered, while allowing for flexibility to incorporate new actions in response to the challenges and opportunities presented by emerging technologies such as artificial intelligence. Thus, the area of artificial intelligence in the administration of justice, although not as a priority, is being considered as a further field for the development of the justice field. In the European countries, the state of advancement of the implementation of artificial intelligence technologies into the judiciary can therefore be called relatively cautious. This does not mean, however, that such solutions are not used at all, as evidenced by the aforementioned *Report on the use of Artificial Intelligence*

⁶³⁹ The ECLI was introduced further to Council Conclusions 2011/C 127/01. Cf. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ajl0056>> accessed 30 March 2025.

⁶⁴⁰ The system was established in April 2012 in order to improve the exchange of information on criminal records throughout the EU. Cf. <https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecris_en> accessed 30 March 2025.

⁶⁴¹ Cf. <<https://interoperable-europe.ec.europa.eu/collection/justice-law-and-security/solution/e-justice-communication-online-data-exchange>> accessed 30 March 2025.

⁶⁴² Council of the European Union, European e-Justice Strategy 2024-2028, available online at: <<https://data.consilium.europa.eu/doc/document/ST-15509-2023-INIT/en/pdf>> accessed 30 March 2025.

*in the judiciary, based on the information contained in the CEPEJ's Resource Centre on Cyberjustice and AI.*⁶⁴³

When this area is analysed from this point of view, i.e. from the point of view of what has been achieved so far, it is not the European Union countries, but the American and Asian countries that are leading the way. One of the most frequently cited and analysed solutions is a system for the application of artificial intelligence to the judiciary from the United States of America called *Correctional Offender Management Profiling for Alternative Sanctions* (COMPAS). This system is designed to assess in criminal cases the criminological prognosis, the risk of reoffending, based on 137 types of data⁶⁴⁴. The COMPAS software uses an algorithm based on machine learning technology also linked to traditional statistical methods and human-designed questionnaires for this assessment. Among other things, the system predicts pre-trial risk, which is a measure of a person's potential to fail to appear and commit new offences while at liberty. For this purpose, the system assesses, among other things, current charges, pending charges, history of previous imprisonment, previous pre-trial failures, housing stability, employment status, social ties or misuse of various substances, which, according to the science, are the most significant indicators affecting the outcome of such risk.⁶⁴⁵ The system also performs a risk assessment to predict new offences after release from prison. Among other things, it uses a person's criminal history, associates, drug involvement and signs of juvenile delinquency as data. The system also makes it possible to predict the commission of violent crimes after release. To do this, the system uses data such as criminal history, history of non-compliance with the law in other ways, occupational problems, educational problems, the age of the person on admission and the age of the person on first arrest, among others. So far, the system has met with a rather enthusiastic reception, although of course it has also been subject to criticism. One example is the position of the Supreme Court of the State of Wisconsin, which emphasised that the COMPAS assessment can be taken into account in sentencing, but that the limitations of the system must

⁶⁴³ 'Report on the Use of Artificial Intelligence (AI) in the Judiciary, Based on the Information Contained in the CEPEJ's Resource Centre on Cyberjustice and AI' (n 515).

⁶⁴⁴ Tim Brennan, William Dieterich and Beate Ehret, 'Evaluating the Predictive Validity of the Compas Risk and Needs Assessment System' (2009) 36 Criminal Justice and Behavior 21.

⁶⁴⁵ Anne L Washington, 'How to Argue with an Algorithm: Lessons from the COMPAS-ProPublica Debate' (2018) 17 Colorado Technology Law Journal 131.

also be taken into account.⁶⁴⁶ What is interesting in this context, however, is this court's assessment that the trial court's use of an algorithmic risk assessment in the sentencing process does not violate the defendant's right to a fair trial, even though the methodology used to prepare the assessment was not disclosed to either the court or the defendant.⁶⁴⁷

Such allegations are increasingly being made against similar solutions. It is stressed that the functioning of such a mechanism should be transparent and that access to the algorithm should be open. It is argued that since such algorithms are usually secret, they cannot be examined by the public and the parties involved, which may constitute a violation of the right to a fair trial.⁶⁴⁸ It is also argued, among other things, that algorithms may be susceptible to various types of burden, that they may be prejudiced. In the case of COMPAS, the result of the study carried out showed, among other things, that the system treated people of a different race unequally. In fact, the study showed that African-Americans were significantly less likely to re-offend, whereas according to COMPAS such a result was true for Caucasians.⁶⁴⁹ Without prejudging the effectiveness of the system, it should therefore be noted that it raises certain controversies, which should undoubtedly be borne in mind in the future when designing analogous solutions.⁶⁵⁰

It should also be mentioned that the *Harm Assessment Risk Tool* (HART) system, for example, used in Northern Ireland, is emerging in the practice of peri-judicial authorities in Europe. It is a risk assessment tool

⁶⁴⁶ *Supreme Court of Wisconsin: 13 July 2016, State v. Loomis* (2016) 881 N.W.2d 749 (Wis.).

⁶⁴⁷ Katherine Freeman, 'Algorithmic Injustice: How the Wisconsin Supreme Court Failed to Protect Due Process Rights in *State v. Loomis*' (2016) 18 North Carolina Journal of Law & Technology 75.

⁶⁴⁸ Yi Wu, 'Data Governance and Human Rights: An Algorithm Discrimination Literature Review and Bibliometric Analysis' (2023) 7 Journal of Humanities, Arts and Social Science 128.

⁶⁴⁹ Anthony W Flores, Kristin Bechtel and Christopher T Lowenkamp, 'False Positives, False Negatives, and False Analyses: A Rejoinder to Machine Bias: There's Software Used across the Country to Predict Future Criminals. And It's Biased against Blacks' (2016) 80 Federal Probation 38.

⁶⁵⁰ Jonathan Dodge and others, 'Explaining Models: An Empirical Study of How Explanations Impact Fairness Judgment' in Wai-Tat Fu and Shimei Pan (eds), *IUI '19: Proceedings of the 24th International Conference on Intelligent User Interfaces* (Association for Computing Machinery 2019) 275.

designed to help criminal justice professionals evaluate the likelihood of an individual reoffending. HART uses predictive analytics and machine learning to assess risk based on various factors, such as criminal history, demographics, and other relevant data.⁶⁵¹

An interesting solution that has already been used for several years in Brazil, for example, is the VICTOR system, developed by the Federal Supreme Court (*Supremo Tribunal Federal*) in partnership with the University of Brasilia and implemented in 2019.⁶⁵² It is one of the most prominent examples of AI adoption in the Brazilian judicial system and represents a significant step towards modernising the country's legal processes. VICTOR uses natural language processing to analyse and summarise lengthy legal documents, saving time for judges and legal professionals. It can provide judges with data-driven suggestions for rulings based on historical case data and legal precedents. This system can identify appeals that fall within one of the 27 most recurrent themes of general repercussion and returning them to the courts of origin, identifying and separating the five main parts of the case file: the judgement appealed against, the admissibility decision of the extraordinary appeal, the petition for the extraordinary appeal, the judgement and the appeal. The system, *inter alia*, converts image files into text and allows words or excerpts to be reproduced in other documents, which makes it easier to write judgements based on what is in the case file. VICTOR can predict the likely outcomes of cases based on historical data. By leveraging advanced technologies like natural language processing, predictive analytics, and automation, the platform has the potential to transform the way courts operate, making them more efficient, transparent, and accessible.⁶⁵³

In addition, the National High Court of Brazil (*Superior Tribunal de Justiça*) developed the ATHOS system, also implemented in 2019, which has an artificial intelligence platform trained by reading approximately 329 000

⁶⁵¹ Marion Oswald and others, 'Algorithmic Risk Assessment Policing Models: Lessons from the Durham HART Model and Experimental Proportionality' (2018) 27 *Information & Communications Technology Law* 233.

⁶⁵² Pedro H Luz De Araujo and others, 'VICTOR: A Dataset for Brazilian Legal Documents Classification' in Nicoletta Calzolari and others (eds), *Proceedings of the 12th Conference on Language Resources and Evaluation (LREC 2020)* (European Language Resources Association 2020) 1449-1458.

⁶⁵³ Frederico Widson da Silva Dantas and Graciéla Farias Braz, 'Inteligência Artificial no Poder Judiciário Brasileiro' (2022) 2 *Revista Jurídica Portucalense* 51, 60.

judgements between 2015 and 2017, having indexed more than 2 million cases with 8 million parts, enabling automatic grouping by similarity, search by similarity, group monitoring and textual search. ATHOS routinely identifies judgements that are similar to those already in the case law database, so that they can be grouped together to avoid polluting the database.⁶⁵⁴ The National Hight Court of Brazil also operates the SÓCRATES system, which uses the same AI engine, for the Justices' offices, E-JURIS, which extracts the legislative references and case law cited in the Court's judgement, and the *Table Unificada de Assuntos* (tool used to standardise the terminology and taxonomy of subjects, classes and case management in the judicial system), which is designed to automatically identify the subject of the case, for the purposes of distribution to the sections of the court, according to the branch of law in which they operate: public law, private law and criminal law.⁶⁵⁵

There are many other tools in the Brazilian judicial system whose functionality has been based on artificial intelligence algorithms. One could mention systems such as HÉRCULES, HÓRUS e ÁMON, ELIS, JUDI, MANDAMUS, or BEM-TE-VI, whose purpose is, broadly speaking, to speed up judicial procedures, which is one of the objectives of the changes to the law there in recent years.⁶⁵⁶ Similar systems are also known in other South American countries.⁶⁵⁷ In turn, it is accepted in the local science there that technology is a value, an instrumental force that enhances human capabilities, transforming the social order. One of the recurring questions, especially among those authors who are critical of the implementation of artificial intelligence in the administration of justice, is that of the protection of human rights.⁶⁵⁸ It is argued that, in the future, it will be necessary to

⁶⁵⁴ Beatriz M Cabrera and others, 'History of Technological Evolution in the Brazilian Judiciary System and the Application of Artificial Intelligence' (2024) 239 *Procedia Computer Science* 1188.

⁶⁵⁵ *ibid* 1192.

⁶⁵⁶ Antônio Pereira Gaio Júnior and Fábila Antonio Silva, 'Direito, processo e inteligência artificial. Diálogos necessários ao exercício da jurisdição' (2023) 24 *Revista Eletrônica de Direito Processual* 60.

⁶⁵⁷ Ornidis Garcés Soto, José Javier Martínez Cordero and Marisol Meza Rodríguez, *Toma de decisiones judiciales en Colombia: análisis crítico del uso de la inteligencia artificial, desde una perspectiva ética y jurídica* (Universidad Cooperativa de Colombia 2023) *passim*.

⁶⁵⁸ Paloma Mendes Saldanha, *Processo Judicial e Pós-humanidade: Transformação do Judiciário e a preservação da jurisdição humana pelo 2o grau de jurisdição* (Universidade Católica de Pernambuco 2020) 12 ff.

transform the way artificial intelligence mechanisms work into mechanisms that will be understandable to lawyers and will allow them to explain to society how the values of the rule of law and the protection of fundamental rights can determine, among other things, the mathematical design of legal processes. It is thus a kind of taming of the algorithm through the law that is to challenge today's judge.⁶⁵⁹

The above image of the use of AI tools in the courts shall be complemented by the often-cited example of Chinese smart courts. This type of court is a court where judicial officers use technological applications to facilitate their work and provide better judicial services to the public. It is primarily about online courts, and China is one of the first countries in the world to take up the challenge to digitise and automate its judicial system to such a far-reaching extent.⁶⁶⁰ The most prominent examples of smart courts are the Internet courts established in Beijing, Hangzhou, and Guangzhou. These courts provide fully online litigation, mediation, and dispute resolution for internet-related disputes, such as e-commerce or small loan disputes. These Internet courts employ advanced technologies, such as facial recognition to confirm the identity of the litigants, blockchain technology to store evidence, and machine learning to automatically generate adjudication documents. Artificial intelligence has thus become an everyday part of the operation of the Chinese judiciary.⁶⁶¹ Other courts in China are also using artificial intelligence. This is done, for example, by the Shanghai High Court, which developed an AI system to help enforce criminal evidentiary procedures by automatically checking and verifying submitted evidence against evidentiary standards. This AI system has many other functions: it can recognise and extract information from evidence, transcribe audio and video files, detect evidence factors in those files, and explain the relationship between different items of evidence. It can also assess the social harm of a criminal case, quantifying and weighing factors in the

⁶⁵⁹ Grenfieth de Jesus Sierra Cadena, 'Revista eurolatinoamericana de derecho administrativo' (2024) 11 Revista eurolatinoamericana de derecho administrativo 1, 28-29.

⁶⁶⁰ George G Zheng, 'China's Grand Design of People's Smart Courts' (2020) 7 Asian Journal of Law and Society 561.

⁶⁶¹ Nyu Wang and Michael Yuan Tian, 'Intelligent Justice: AI Implementations in China's Legal Systems' in Ariane Hanemaayer (ed), *Artificial Intelligence and Its Discontents* (Palgrave Macmillan 2022) 197 ff.

case file to determine the social harm or recommend similar cases and offer a frame of reference for sentencing.⁶⁶²

According to emerging ideas in China, by 2030 AI must provide whole-process high-level smart support, and ongoing research should lead AI to a state where AI needs to be fully operational and widespread across all courts in China (by this date). Such a stance emerges, for example, from the document '*New Generation Artificial Intelligence Development Plan*',⁶⁶³ according to which China will emerge as the global innovation centre for artificial intelligence. This emphasises that AI products and services should be free from discrimination and prejudice, especially since AI is the driver of automation. As one may think, the ambitions of the Chinese judiciary to use AI to strengthen the judicial process and its social-governance role as part of the broader political-legal system are clear. Therefore, it is raised in the doctrine, among others, that the next step in court informatisation will increasingly expand and upscale the use of technologies such as AI.

When presenting similar systems in operation or being designed in other countries, legal science usually indicates that, in the light of growing interest in this area, it can be expected that further research will be necessary to assess the impact of artificial intelligence on the performance of various predictive tools, which is expected, among other things, to play an important role in future AI governance.⁶⁶⁴ The future of justice is an artificial future rather than a human future.

In this context, one can mention, for example, the concept of theory of goal-oriented actions (TOGA),⁶⁶⁵ a goal-oriented framework for modelling and analysing legal decision-making that helps break down complex legal reasoning into goals, actions, and constraints, making it useful for AI applications, predictive analytics, and improving transparency in the

⁶⁶² Straton Papagiannas and Nino Junius, 'Fairness and Justice through Automation in China's Smart Courts' (2023) 51 Computer Law & Security Review: The International Journal of Technology Law and Practice 1, 4.

⁶⁶³ Available online at: <<https://digichina.stanford.edu/work/full-translation-chinas-new-generation-artificial-intelligence-development-plan-2017/>> accessed 30 March 2025.

⁶⁶⁴ Bernd Carsten Stahl and others, 'A Systematic Review of Artificial Intelligence Impact Assessments' (2023) 56 Artificial Intelligence Review 12799.

⁶⁶⁵ This concept on the ground of litigation has been known for a long time. Cf., e.g. Alan E Golomb, 'Recognition of Foreign Money Judgments: A Goal-Oriented Approach' (1969) 43 St. John's Law Review 604.

legal process. While TOGA itself is not widely used, the principles of goal-oriented reasoning and AI-assisted decision-making are increasingly being explored in the legal tech industry.⁶⁶⁶ The broader principles of goal-oriented reasoning and AI-assisted decision-making are being explored in various jurisdictions as part of the growing trend towards integrating technology into the legal system.⁶⁶⁷

Only a step away from this area is the emerging field of value awareness engineering (VAE).⁶⁶⁸ This is an area of research based on the concept of value-aware, indicating that artificial intelligence systems should be value-aware, i.e. they should be able to reason explicitly about the value matching of their actions. Values are often modelled as preferences for states or actions, which are then extended to plans. Therefore, it is recognised that the possible impact of value awareness engineering on legal decision-making can be profound. It has the potential to make legal systems more fair, transparent, consistent, and aligned with societal values. By explicitly incorporating ethical and human values into decision-making processes, value awareness engineering can help address some of the most pressing challenges in the legal system, such as bias, inconsistency, and ethical dilemmas. However, its successful implementation requires careful consideration of cultural, technical, and institutional factors. As AI and technology continue to play a larger role in legal systems, value awareness engineering will likely become an essential tool for ensuring that these systems remain just and human-centric.⁶⁶⁹

However, research on value awareness engineering is still in its early stages but is rapidly gaining momentum as the need for ethical and value-

⁶⁶⁶ Cf. Deepak Bhaskar Acharya, Karthigeyan Kuppan and B Divya, 'Agentic AI: Autonomous Intelligence for Complex Goals—A Comprehensive Survey' (2025) 13 IEEE Xplore 18912.

⁶⁶⁷ Cf. Konrad Sowa and Aleksandra Przegalinska, 'From Expert Systems to Generative Artificial Experts: A New Concept for Human-AI Collaboration in Knowledge Work' (2025) 82 Journal of Artificial Intelligence Research 2101.

⁶⁶⁸ Sascha Ossowski and Alberto Fern, 'An Ontology for Value Awareness Engineering' (2024) 16 Proceedings of the 16th International Conference on Agents and Artificial Intelligence 1421.

⁶⁶⁹ Nicolas Lazzari and others, 'Explainable Moral Values: A Neuro-Symbolic Approach to Value Classification' in Albert Meroño Peñuela and others (eds), *The Semantic Web: ESWC 2024 Satellite Events* (Springer 2024) 238 ff.

aligned AI systems becomes increasingly urgent.⁶⁷⁰ While large-scale implementation is likely a decade or more away, significant progress is expected in the next 5-10 years, particularly in high-stakes domains like legal decision-making.⁶⁷¹ The timeline for adoption will depend on technological advancements, regulatory developments, and societal acceptance, but value awareness engineering is poised to play a critical role in shaping the future of ethical AI and decision-making systems.⁶⁷²

Other systems also need to be recognised. For example, a system - known from countries such as the United States of America, Canada or Australia - with a completely different functionality, obviously based on artificial intelligence, referred to as *DoNotPay*, seems interesting.⁶⁷³ It is a platform that provides access to various legal services and tools through artificial intelligence. It was created with the goal of helping people navigate legal issues without the need for expensive lawyers. The system is often referred to as the 'world's first robot lawyer'.⁶⁷⁴ It has a wide range of areas of applications: it can help users to challenge parking tickets, it can help users to take legal actions against companies that make unwanted phone calls, it can help users to claim compensation for delayed or cancelled flights, it can help users to generate various legal documents etc. The system operates on a subscription model. There have been a number of recent comments towards this idea, including demands from disgruntled clients, but more interestingly, claims from other lawyers aiming, among other things, to ban this kind of 'practising law without a licence'. Perhaps this is why the founder's of *DoNotPay* ambition is to 'remove the word 'lawyer' from the dictionary, because they are charging hundreds or thousands of dollars for copying and pasting a few documents'.⁶⁷⁵ Without settling this dispute, it is

⁶⁷⁰ Hua Shen and others, 'ValueCompass: A Framework of Fundamental Values for Human-AI Alignment' (2018) 2409 ArXiv 09586.

⁶⁷¹ Travis LaCroix, *Artificial Intelligence and the Value Alignment Problem* (Broadway Press 2025) 263 ff.

⁶⁷² Cf., however, Iason Gabriel and Geoff Keeling, 'A Matter of Principle ? AI Alignment as the Fair Treatment of Claims' (2025) 182 Philosophical Studies 1.

⁶⁷³ Rachen Cohn, 'To Pay or Not to Pay: Reducing Improper Payments through the Do Not Pay List' (2012) 42 Public Contract Law Journal 369.

⁶⁷⁴ Michael Loy, 'Legal Liability for Artificially Intelligent "Robot Lawyers"' (2022) 26 Lewis & Clark Law Review 953.

⁶⁷⁵ Clara Muray, 'In the Battle for the Future of Work, AI Is Not above the Law' *Raconter* (13 March 2023) <<https://www.raconteur.net/technology/ai-lawyer-lawsuit-donotpay-sued>> accessed 30 March 2025.

worth noting that AI systems can therefore also serve the clients of the courts, which seems interesting in itself. The use of AI tools by the public, while the lack of such tools in the judiciary, would create additional difficulties for the judiciary, which does not seem appropriate or necessary.⁶⁷⁶

This so-called advisory application of artificial intelligence is not something surprising today.⁶⁷⁷ It appears, for example, in insurance cases, as a kind of predictive tool as to the expected outcome of a case. An example of this is the Civil Resolution Tribunal in Canada, where victims of road traffic incidents can receive free information about their claims. The tool uses a question-and-answer function to provide the public with tailored legal information, written in plain language, and self-help tools. The aim of this solution is to seek to resolve disputes without the need to file a lawsuit.⁶⁷⁸ The idea is to clarify the legal position of the injured party, relieving the judicial apparatus while ensuring satisfactory compensation. Another similar example is an application developed for a Japanese insurer, *Fukoku Mutual Life*.⁶⁷⁹ This insurer has implemented an AI-based application to handle medical claims. The application uses AI to handle claims data by automatically processing all medical documents related to a case, searches them for relevant information and automatically calculates the compensation (amount) based on all the information collected. These calculations are forwarded to a human who validates them and issues the appropriate decision to the injured party. As indicated, after the implementation of the system, employee productivity increased by 30% and the accuracy rates of compensation payments also changed positively.⁶⁸⁰ The same AI-based solution, albeit without human

⁶⁷⁶ Drew Simshaw, 'Interoperable Legal AI for Access to Justice' (2025) 134 Yale Law Journal Forum 795.

⁶⁷⁷ Chidi Ukamaka Betrand, Oluchukwu Uzoamaka Ekwealor and Chinazo Juliet Onyema, 'Artificial Intelligence Chatbot Advisory System' (2023) 12 International Journal of Intelligent Information Systems 1.

⁶⁷⁸ Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 Windsor Yearbook of Access to Justice 112.

⁶⁷⁹ Artur Modliński and Marcin Bartosiak, 'Replaced by Machines? The Intelligent (Ro)Bots as the Disruptive Innovation for Human Workforce in Cross Cultural Perspective' in Ilona Swiatek-Barylska and Udaya Mohan Devadas (eds), *Facets of Managing in Cross-Cultural Diversity* (Wydawnictwo Uniwersytetu Łódzkiego 2021) 78 ff.

⁶⁸⁰ Cf. Paresh Vartak and Deepesh Jain, *AI-Driven Transformation in the Insurance Industry* (LTI Mindtree 2021) 3 ff.

involvement, has already been used, for example, in the United States of America, where the startup *Lemonade* has implemented a Big Data-based solution, allowing an AI claims chatbot called *Jim* to handle the entire claims process without any problems. For example, in 2019 *Jim* processed approximately 20 000 claims and other insured enquiries and paid out more than US\$2.5 million without human intervention.⁶⁸¹ Intentions to use similar solutions are also emerging in other countries. E.g. in Poland, preparations are underway, for example, to implement a tool that analyses medical records and makes payment decisions (UNIQA), or where the first steps are being taken with damage image analysis technology in the field of motor vehicle damage.⁶⁸² This area will certainly develop.

Also noteworthy is the *PretorIA* system, recently adopted by the Colombian Constitutional Court.⁶⁸³ Its main task is to help judges preselect the docket of a court, in which the AI-based system replaced the previous system which relied on law clerks reviewing all lower court decisions and writing case file summaries. This system applies to the instrument known as ‘*tutela*’, the right of action created to provide injunctive relief for protecting fundamental constitutional rights. *Tutela* was established with the explicit intent of expanding access to justice for marginalised segments of society who lack an efficient mechanism to resolve their conflicts with the state and powerful private actors. Individuals and legal persons can file *tutela* claims to protect their fundamental rights whenever they are violated or threatened by a state entity or a private actor that exerts some type of authority or power over them, as long as they do not have other effective means of judicial protection of their rights.⁶⁸⁴ The complaint is a very popular instrument in Colombia, by way of example, in 2021 approximately 1.5 million such complaints were filed in the ordinary courts, while the Colombian Constitutional Court allowed only a few of them. *PretorIA* uses supervised machine learning to

⁶⁸¹ Henrik Naujoks and others, ‘A Digital Reckoning for Insurance Companies’ (2020) <<https://www.bain.com/insights/a-digital-reckoning-for-insurance-companies/>> accessed 30 March 2025.

⁶⁸² Report: ‘Insurtechy w Polsce’ (2021) <<https://www.cashless.pl/10975-insurtechy-w-polsce-raport-do-pobrania>> accessed 30 March 2025.

⁶⁸³ Camilo Andrés Quintero Reyes and Carlos Froilan Cala Amaya, *Implementación de la plataforma digital PretorIA en los actos procesales y decisiones judiciales en los procesos ejecutivos de mínima cuantía* (Universidad Pontificia Bolivariana 2022) passim.

⁶⁸⁴ Liliana Carrera Silva, ‘La acción de tutela en Colombia’ (2011) 27 Revista del Instituto de Ciencias Jurídicas de Puebla 72.

read thousands of case files and predict the presence of selection criteria. This tool has significantly facilitated the work involved.⁶⁸⁵

There are already many similar examples of the use of AI-based tools today. It would be impossible to present them all in one place. However, looking at those mentioned, as well as some solutions not presented so far, one may be tempted to conclude that a place is slowly being created for the use of artificial intelligence in the adjudication of court cases, at least in certain categories. The doctrine mentions this directly and unequivocally. The support of the judiciary in terms of new technologies today is no longer just about solutions to assist the judge, the use of which cannot be overestimated, but also about the use of artificial intelligence alone, which can decide certain categories of cases instead of the judge. Particularly in the context of the COVID-19 pandemic, there has, moreover, been a large-scale and intensified search for tools that could allow the courts to function normally, eliminating at least some of the shortcomings of their operation, in a situation of mandatory complete social isolation.⁶⁸⁶ This area is certain to develop and evolve, and artificial intelligence is a tool and a direction for potential development. The new AI models known from other sectors of the economy today have much broader functionalities than those developed about a decade ago, or those developed more recently but on such, slightly older, models. They are also usually devoid of the disadvantages that have been mentioned so far in the context of AI models used in the judiciary to date. The development of an AI model that is optimal from the point of view of the adjudication of court cases is only a matter of time.

To these observations it must be reminded that, according to the EU AI Act, artificial intelligence systems relating to judiciary have been recognised as high risk (High-Risk AI).⁶⁸⁷ This term refers to systems whose potential applications carry a significant risk of negative consequences for human rights, security or well-being. Such systems may be used in socially critical areas and therefore also in the justice system. High risk means that providers of such AI systems will be obliged to continuously analyse the risks of the systems they develop, inter alia in the context of ensuring the protection of

⁶⁸⁵ Pablo Rueda Saiz, 'Docket Selection and Judicial Responsiveness: the Use of AI in the Colombian Constitutional Court' (2021) 30 William & Mary Bill of Rights Journal 418.

⁶⁸⁶ Engstrom (n 380).

⁶⁸⁷ Akash R Wasi and others, 'Affirmative Safety: An Approach to Risk Management for High-Risk AI' (2024) 2406 ArXiv 15371.

fundamental rights. Under Article 27 of the EU AI Act, before implementing a high-risk artificial intelligence system, those using such systems - in particular public and private entities providing services of a public nature - are obliged to conduct a fundamental rights impact assessment. This will certainly be an interesting area of future research.⁶⁸⁸

Artificial intelligence in the administration of justice is certainly a risky solution, at least from today's point of view. It is a solution that requires further research. However, AI can do a lot for the functioning of the courts. AI can analyse thousands of legal documents, case laws, or contracts in seconds or minutes versus hours, days, or even months for humans. It can also solve more than one problem at a time, doing so at least 1000 times faster than humans. With AI, therefore, all procedural steps could take much less time, making court proceedings more efficient.⁶⁸⁹

AI-based solutions may therefore be a new way forward for the judiciary. Undoubtedly, artificial intelligence can influence the adjudication of cases by organising and structuring information, providing advice or causing the adjudication process to become more uniform. Recognising certain model views in the documents to be analysed, e.g. in the justifications of court decisions or doctrinal positions, is the task of any adjudication process.⁶⁹⁰ There is no doubt that a mechanism based on artificial intelligence will come much more quickly to determine whether there is a line of jurisprudence in a given area that should be considered for the resolution of a case.⁶⁹¹ All judgments, as well as scholarly articles or commentaries, contain a wide variety of information. Automated analysis of these can significantly speed up specific procedural decisions, especially in complex matters requiring specialist knowledge. Automated analysis of various data can also have other applications.

⁶⁸⁸ Isabelle Hupont and others, 'Documenting High-Risk AI: A European Regulatory Perspective' (2023) 56 Computer 18.

⁶⁸⁹ Peter H Diamandis and Steven Kotler, *The Future Is Faster Than You Think: How Converging Technologies Are Transforming Business, Industries, and Our Lives* (Simon & Schuster 2020) 95 ff.

⁶⁹⁰ Maria Dymitruk and Jacek Gołaczyński, 'Elektroniczny sąd a sztuczna inteligencja w prawie polskim' in Kinga Flaga-Gieruszyńska, Jacek Gołaczyński and Dariusz Szostek (eds), *Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe. Zagadnienia wybrane* (CH Beck 2019) 47 ff.

⁶⁹¹ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 96) 83 ff.

Therefore, as can be seen in advance, there is no doubt that artificial intelligence can be of assistance to the judiciary. This assistance can relate to many aspects of its functioning. There are even those who believe that artificial intelligence would make the adjudication of individual cases fairer.⁶⁹² It could also certainly become more efficient, especially in those types of cases where human involvement consumes all of a person's professional capacity. An example of such a case is the already mentioned and recently examined in Poland criminal case concerning the so-called Amber-Gold affair. It should be recalled that the justification for the judgment of the court of first instance in this case is 9345 pages long, and its preparation took more than nine months. Leaving aside the actual possibility for a human being to prepare more than 30 pages of text per day, it seems that artificial intelligence could provide applied support in this area. According to standard tools, large language models generate text at 50-100 words per second, which means that it takes between 5 and 10 seconds to prepare 1 page of text. The total preparation time for 9345 pages of justification would therefore be between 13 and 26 hours.⁶⁹³

At the same time, it should be emphasised that it is precisely the reasonableness and transparency of decision-making by AI-based mechanisms that are the solid arguments raised so far against such solutions.⁶⁹⁴ For while many would accept artificial intelligence support of the adjudication process, the lack of knowledge of how the algorithm arrives at specific conclusions and the concomitant lack of traceability of the subsequent steps in the argumentation (which is a characteristic of most algorithms used to date) would seem to be relevant to the assumption, if only against the background of the standards associated with the so-called fair trial, that the rights of a party could be violated in this way. However, this is certainly one of the system's functionalities that could be improved in the future, which in the case of matters such as the one discussed above, would have a significant impact on the effectiveness of the justice system.

⁶⁹² Mirko Bagaric and others, 'The Solution to the Pervasive Bias and Discrimination in the Criminal Justice System: Transparent and Fair Artificial Intelligence' (2022) 59 *American Criminal Law Review* 95.

⁶⁹³ It can be pointed out here that, for example, Paradise Paper, a leak that involved about 13.4 million documents was analysed by a team of 95 journalists for about 18 months.

⁶⁹⁴ Marrow, Karol and Kuyan (n 2) *passim*.

The application of artificial intelligence can have different dimensions depending on the specificities and level of involvement of the court in the use of new technologies. It can therefore range from purely technical activities (e.g. speech-to-text conversion), through various levels of case management solutions, up to the full application of artificial intelligence in predicting the outcome of judicial proceedings and supporting the development or final decision-making process.

Automated analysis can not only significantly speed up specific process decisions. Automated analysis of various data can also have other applications. This can be seen, for example, in the *e-Discovery* system, which originated in the United States of America and has not yet been mentioned, for the preparation of evidentiary proceedings, which may include litigation.⁶⁹⁵ The so-called electronic discovery, involves the collection, preparation and presentation of electronic evidence, i.e. evidence that is based on electronically stored information. The ways in which potential evidence is handled in *e-Discovery* are governed by rules depending on statutory requirements or by guidelines agreed upon by the parties and subsequently accepted by the judge. The fact that a specific algorithm is used significantly reduces the length of the evidence handling process.⁶⁹⁶ The use of *e-Discovery* involves the use of an algorithm in the pre-trial phase in a trial, where each party investigates the facts of the case by, among other things, obtaining evidence from the opposing party. In the legal system there, it is a widely used mechanism that essentially allows predicting the outcome of a case. It is undoubtedly a much faster mechanism than physically reviewing all the data manually.⁶⁹⁷

The so-called advisory application of artificial intelligence, on the other hand, seems to be needed to the extent that, in principle, anyone, not only the judge leaning on a case, could receive information on the expected outcome after certain facts have been presented. An example of this is the tool already mentioned and operating in Canada within the Civil Resolution Tribunal

⁶⁹⁵ Kato Nabirye H., 'E-Discovery and the Language of Digital Evidence' (2025) 6 Eurasian Experiment Journal of Humanities and Social Sciences 39.

⁶⁹⁶ Jack G Conrad, 'E-Discovery Revisited: The Need for Artificial Intelligence beyond Information Retrieval beyond Information Retrieval' (2010) 18 Artificial Intelligence and Law 321.

⁶⁹⁷ James N Dertouzos, Nicholas M Pace and Robert H Anderson, *The Legal and Economic Implications of Electronic Discovery* (Institute for Civil Justice 2008) 7 ff.

in the province of British Columbia, where victims of road traffic incidents can receive free information about claims.

Predictive tools that make solid assumptions about the outcome of a future court case may therefore be of great importance for the development of artificial intelligence tools for the judiciary. For this reason, further tests of software analysing specific judgement databases and drawing appropriate conclusions from these judgements should be expected in the near future. According to many, the justice system of the future is also one where justice will be predictable by means of artificial intelligence.⁶⁹⁸ This is already recognised by many stakeholders, including such major institutions as the European Union and the Council of Europe.

On the other hand, the stage of autonomous decision-making by artificial intelligence, according to the commonly held view, is also a stage of the future, although rather more distant. This is due to a number of doubts about the functioning of artificial intelligence that have been raised over the years. As artificial intelligence has developed, some issues have been clarified and new ones have emerged. Particular issues in this area relate, among other things, to the question of trust in the administration of justice, and the rather general statement that the transparency of procedural decision-making by artificial intelligence - at least through the prism of the tools used so far in practice - leaves much to be desired. Despite the recognition of the relevant potential, which is apparent from the range of solutions mentioned so far, it could be argued that this area raises several concerns, the resolution of which may only allow for more advanced research and conclusions as to the actual possibilities of replacing the human judge with a (ro)bot judge. This potential, in the context of possible concerns about the use of artificial intelligence in the judiciary, is therefore worth looking into.

4.4. Artificial intelligence and its potential for judicial decision-making. Towards efficiency in the judiciary

The scenario of a 'transfer' of the judiciary and a predictable change in the functioning of the legal profession is widespread today and appears in many places. Lawyers are drawing a future of legal services using smart contracts, Blockchain, chatbots, legal argumentation software, corporate

⁶⁹⁸ Myltseva Veronika, 'The Legal Nature and Principles of the Predictive Justice' (2019) 3 *Recht der Osteuropäischen Staaten* 59; Sylvie Lebreton-Derrien, 'La justice prédictive. Introduction à une justice «simplement» virtuelle' (2018) 60 *Archives de philosophie du droit* 3.

governance via electronic agents, predictive policing, preventive justice based on behavioural pattern analysis, avatars- mediators, or involving smart prison.⁶⁹⁹ It should therefore come as no surprise that there are increasingly bold calls in the world of legal science to replace traditional human judges with algorithmic, (ro)bot judges. Such a possible new reality, as pointed out in many places, has undeniable benefits, such as reducing the workload of the courts, improving the efficiency of their operation, streamlining court proceedings, significantly reducing the waiting time for the administration of justice, or predictability of the outcome of court cases. Artificial intelligence, in many places, has already proven its suitability to be able to replace humans at various stages of the administration of justice. Technologically, this seems possible thanks to the automation of document processing, i.e. also lawsuits and applications used in court proceedings, analysing various data and extracting information from documents, and thanks to machine learning and deep learning, it seems universal in various tasks, including those of interpreting case law and doctrine and predicting the possible outcome of a particular case. Artificial intelligence can process speech, translate it, understand it and refer to it, so it can be helpful in the activity of questioning parties or witnesses. It has many other advantages that can be used at various stages of court proceedings. It can prepare draft decisions and their justifications, not to mention making automatic judicial decisions. It therefore appears that, at least from a technological point of view, as evidenced by several solutions in practice to date, artificial intelligence algorithms are able to examine court cases. They can replace the judge, at least in certain categories of cases, as will be discussed further. Research to date shows, at least indirectly, that artificial intelligence has the potential to pose a significant challenge to the legal system in the context of judicial decision-making, where it is underestimated. It is only necessary to develop a suitable tool to fully exploit this potential.

Indeed, as it seems, the potential of AI is much broader than that of a human judge, at least in some areas of life, including - at least *prima facie* - the judiciary. Nevertheless, the potential of AI compared to that of humans is a complex and nuanced topic. While AI has certain advantages in specific areas, it is not inherently 'better' than human potential - rather,

⁶⁹⁹ Federico Bueno de Mata, 'La necesidad de regular la inteligencia artificial y su impacto como tecnología disruptiva en el proceso de desafío utópico a cuestión de urgente necesidad' in Federico Bueno de Mata (ed), *El impacto de las tecnologías disruptivas en el derecho procesal* (Aranzadi 2022) 15-31.

it complements human capabilities in unique ways.⁷⁰⁰ However, in the context of litigation speed and efficiency, AI has a fundamental advantage over humans.⁷⁰¹ AI can process and analyse vast amounts of data far faster than humans. For example, AI can analyse millions of documents in seconds, whereas a human would take years. AI can perform repetitive tasks with consistent accuracy and without fatigue, which, in the context of resolving many cases, in the desired shortest time possible, seems extremely important. AI is available 24/7, which also cannot fail to make a difference. Due to several key factors rooted in the design of AI, its architecture, and operational principles, AI can be an extremely important tool on the road to efficient justice.⁷⁰² AI systems, due to parallel processing, may perform many tasks simultaneously, while human process information sequentially (one task at a time). Computers operate at incredibly high speeds, measured in gigahertz (billions of cycles per second). This allows AI algorithms to perform complex calculations in fractions of a second, while human brains operate much slower. AI uses specialised algorithms optimised for specific tasks like pattern recognition, classification, and prediction. These algorithms are designed to process data efficiently. In case of humans this process is much slower. AI can automate repetitive data analysis tasks, such as sorting, filtering, and summarising data, without manual intervention. Humans find repetitive tasks tedious and error-prone, especially when dealing with large volumes of data. AI systems can store and recall vast amounts of data instantly. This allows them to access and analyse historical data quickly. Human memory is limited and fallible. Recalling and processing large amounts of information is slower and less reliable. AI can analyse data objectively, without being influenced by cognitive biases (assuming the training data and algorithms are unbiased). Humans are prone to biases, which can slow down or distort data analysis.⁷⁰³

The above are just some of the elements that characterise the technological superiority of artificial intelligence over humans, in the context of analysing documents and making judicial decisions based on them. AI's strength lies in its ability to handle large-scale, repetitive, and data-intensive tasks with speed and precision. This makes AI an invaluable

⁷⁰⁰ *McInerney* (n 9) 80 ff.

⁷⁰¹ *Papagianneas* (n 23) 36 ff.

⁷⁰² *Suárez Xavier* (n 118) 331 ff.

⁷⁰³ Stephen J Andriole, 'The Big Miss: AI Will Replace Just About Everything' (2024) 55 *Communications of the Association for Information Systems* 819.

tool, at least for augmenting human capabilities in data-driven fields such as justice. A *prima facie* assessment supports the use of such tools in the judiciary on a large scale. Perhaps AI won't replace humans completely, but definitely humans with AI will replace humans without AI.

Already today there are courts and court cases in which procedural decisions, hitherto reserved for humans, are made automatically or with the use of automated tools. It may be recalled that such systems include, for example, the already mentioned COMPAS, used in sentencing criminal defendants to assess the risk of re-offending to make decisions as to bail. There are other systems as well. For example, for criminal cases, an 'automatic on-line conviction' proposal has also been in place in the UK since 2017.⁷⁰⁴ One such system that has been built for automated judicial decision-making is also the Court 206 system used by Shanghai's High Court in China for criminal cases. In the first phase, AI technologies are used to extract information from relevant legal texts to provide a framework of legal fact information for generating judgements and predicting sentences. This includes extraction of legal facts and verification from electronic case files. In addition, the system generates a 'reason for judgment'. The cause of action process consists of two parts: verification of the facts and application of the related laws/regulations. The first part is designed to replicate the process by which judges identify the laws and regulations applicable to the facts they are considering. This is referred to as the 'automatic justification generation' of the Court 206 system. AI technology helps to find commonalities between cases to maintain consistency in decisions. The system matches the relevant rules and regulations to the facts and circumstances and then generates 'reasons for judgment'. These reasons include the reasons for the model conviction as well as the reasons for the sentence. Finally, the reasons for conviction are classified and form the starting point for sentencing and sentencing.⁷⁰⁵

There are already many examples in the world of other solutions in which judicial decisions are taken automatically or there are mechanisms in place to suggest the appropriate decision of a case to a human judge. In principle, a general observation can be made that at least in some aspects of the functioning of the judicial apparatus, actions hitherto reserved for

⁷⁰⁴ Judith Townend and Lucy Welsh, *Observing Justice. Digital Transparency, Openness and Accountability in Criminal Courts* (Bristol University Press 2023) 40-64.

⁷⁰⁵ Yadong Cui, *Shanghai Intelligent Assistive Case-Handling System for Criminal Cases - System 206* (Springer 2020) passim.

humans can be taken automatically. Solutions using artificial intelligence algorithms have a leading role in this automatism. In principle, their only drawback, at least the one raised in legal science, is a deficit in the sphere of fundamental rights. However, this deficit can be remedied by constructing tools that adequately implement the standards of the right to a fair trial.⁷⁰⁶

As research in this area indicates, implementing AI in judicial decision-making has the potential to significantly improve the efficiency of the judiciary in several ways, particularly in terms of faster case processing, streamlined administrative tasks, and enhanced legal research. AI can quickly process high volumes of cases or can analyse case data to prioritize cases based on urgency, complexity, or other criteria, ensuring that critical cases are addressed more quickly.⁷⁰⁷ It can also ensure that legal rules are applied consistently across similar cases, reducing the need for appeals or retrials due to inconsistent rulings. What is also of some importance, AI can analyse court processes to identify inefficiencies or bottlenecks, enabling policymakers to implement targeted reforms. With the ability to minimise errors in tasks like data entry, document review, and legal research, this is a uniquely interesting area for individual legislators confronting problems specific to today's traditional and heavily analogue justice system.⁷⁰⁸

Judgments issued *ex machina* are no longer just a fantasy, a dream of those fascinated by new technologies. It is today's reality for the judiciary, which cannot remain indifferent to such challenges. However, new and innovative technologies typically offer both promise and peril. As may be predicted, it is difficult to trust the unknowable. This is certainly the case with the use of AI in judicial decision-making. AI provides the benefits of cost-effective and time-efficient decision-making in the justice system, simultaneously raising a variety of legal concerns.⁷⁰⁹

⁷⁰⁶ Zichun Xu, Yang Zhao and Zhongwen Deng, 'The Possibilities and Limits of AI in Chinese Judicial Judgment' (2022) 37 AI & Society 1601.

⁷⁰⁷ Quintero Reyes and Cala Amaya (n 683) *passim*.

⁷⁰⁸ Pérez Estrada (n 583) 115 ff.

⁷⁰⁹ Ummey Sharaban Tahura and Niloufer Selvadurai, 'The Use of Artificial Intelligence in Judicial Decision-Making: The Example of China' (2022) 2 International Journal of Law, Ethics, and Technology 1.

An area of such doubt is, among others, the area of what can be called the dehumanisation of justice.⁷¹⁰ More than once, in the current state of research on the use of artificial intelligence, it is pointed out that the human capacity for creativity, empathy, and emotional intelligence are qualities that distinguish humans from AI, which, in the context of judicial decision-making, seems to be of significant importance. Unlike AI, which follows set rules and algorithms, humans have an innate ability to think critically, adapt to new situations and express complex emotions.⁷¹¹ However, whether emotion-driven justice is really appropriate and whether judges should have 'the right to emotions', as it is generally perceived, are questions that have long raised significant questions. After all, judges are supposed to be impartial, and that is how they hear cases submitted to their judgment. This issue of judicial objectivity, which has been raised earlier, it should be recalled, has been the subject of much academic discussion.⁷¹² The vision of an objective judge dispassionately adjudicating each and every dispute submitted to his or her judgement has always appeared tempting. Emotions, however, make judges human, which many believe is a prerequisite for the proper administration of justice in general.⁷¹³ It is therefore recommended that these values be reconciled in the context of the proper administration of justice. Intuitively, however, it would seem that emotion is not a characteristic of artificial intelligence.

Meanwhile, recent research in the area of artificial intelligence shows the opposite. Artificial intelligence may even exhibit a kind of emotional intelligence.⁷¹⁴ Emotional intelligence, on the other hand, is the ability not only to regulate one's own emotions, but also to read others' and respond to them, which, especially in the judicial system may seem desirable.⁷¹⁵

⁷¹⁰ Guido Noto La Diega, 'Against the Dehumanisation of Decision-Making' (2018) 9 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 3.

⁷¹¹ Sourdin (n 624) 1117 ff.

⁷¹² Terry A Maroney and James J Gross, 'The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective' (2013) 6 *Emotion Review* 142.

⁷¹³ Aleksandra Partyk, 'Sędziowie o emocjach - rozważania w świetle badań empirycznych' in Julia Stanek (ed), *Emocje i motywacja w prawie. Wybrane aspekty* (Oficyna Wydawnicza AFM 2022) 41-73.

⁷¹⁴ Tingzhao Fu and others, 'Optical Neural Networks : Progress and Challenges' (2024) 13 *Light: Science & Applications* 263.

⁷¹⁵ Gustavo Assunção and others, 'An Overview of Emotion in Artificial Intelligence' (2022) 3 *IEEE Transactions on Artificial Intelligence* 867.

Research in this area is developing all the time, and the usefulness of artificial intelligence, backed up by these kinds of values, as seen in various research findings on different aspects of the use of artificial intelligence in society, heralds a new era of more accessible, effective and personalised algorithms, the use of which for resolving disputes between people seems desirable. Artificial intelligence is becoming more and more emotional, and, as one may think, in the context of emotions inherent in the administration of justice, it may soon meet the standards required by the public, if it does not already do so. In turn, the problem lies - as one might think - primarily in the trust of the public rather than the expression of emotions.⁷¹⁶

Trust, on the other hand, is limited in artificial intelligence, at least for several reasons. One of these is certainly artificial intelligence hallucinations.⁷¹⁷ This is a situation defined as one in which an AI model generates information that is not true, not grounded in reality. As indicated, a hallucination can be the result of a misinterpretation of input data or a lack of relevant information in the AI training set.⁷¹⁸ This is one of the challenges of this area, especially when artificial intelligence generates content about which users may not be aware that the information received is false, as can be imagined especially when analysing large data sets. It is now being raised that it is possible to avoid hallucinations in AI models, which requires an appropriate approach to training and testing individual models. In this context, the provision of high-quality data and the use of techniques to validate the results, the verification of generated content by experts or the use of AI models in combination with knowledge bases and the implementation of mechanisms to assess the reliability of responses are key. In this respect, the development of explainable AI techniques allows a better understanding of how models make decisions, which increases their transparency.⁷¹⁹

Other concerns related to the lack of trust in AI models, especially in the context of the judiciary, as already mentioned, are related to bias, algorithmic

⁷¹⁶ Cf., however, Alessandro Gabbiadini and others, 'The Emotional Impact of Generative AI: Negative Emotions and Perception of Threat' (2025) 44 *Behaviour & Information Technology* 676.

⁷¹⁷ Michele Salvagno, Fabio Silvio Taccone and Alberto Giovanni Gerli, 'Artificial Intelligence Hallucinations' (2023) 27 *Critical Care* 180.

⁷¹⁸ Hussam Alkaissi and Samy I McFarlane, 'Artificial Hallucinations in ChatGPT: Implications in Scientific Writing' (2023) 15 *Cureus* 2.

⁷¹⁹ Varun Magesh and others, 'Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools' (2024) 2405 *ArXiv* 20362.

bias, which seems to be another major challenge in the development of AI models used in the judiciary. This phenomenon is that AI models may favour certain groups or make decisions based on incomplete or erroneous data. This is often due to the quality of the training data, which may contain historical biases or inequalities, resulting in erroneous decisions.⁷²⁰ Methods already exist to minimise bias in AI models. One key step is to ensure the diversity of the training data. The more diverse the data, the less risk the model will favour certain groups. In doing so, many places in science emphasise the need to implement mechanisms to monitor AI decisions in order to detect potential biases and correct them on the fly. In the field of justice, this may have different dimensions, as will be discussed further.⁷²¹

In this context, it should be mentioned, moreover, that people are also subject to various types of influence and pressure. One can mention the well-known studies confirming the hungry judge effect. Based on observations of the decisions of Israeli parole boards made in 2011, for example, it was found that the granting of parole was 65% at the start of a session but would drop to nearly zero before a meal break and jump back up to approximately 65% after a break for a meal. This leads to the conclusion that mental depletion as a result of fatigue caused decisions to increasingly favour the status quo, while rest and replenishment then restored a willingness to make bold decisions.⁷²² Human justice, like that of artificial justice, is therefore not perfect.

The challenge of justice, especially one based on artificial intelligence, is also one of ethics. The integration of artificial intelligence into legal systems raises complex moral, social, and legal questions.⁷²³ Fairness and equality before the law are fundamental principles of justice and biased AI can undermine these principles. Furthermore, transparency is essential for trust and accountability in the judicial system. Without it, parties may not accept AI-generated decisions as legitimate. Without clear lines of responsibility,

⁷²⁰ David Danks and Alex John London, 'Algorithmic Bias in Autonomous Systems', *Proceedings of the Twenty-Sixth International Joint Conference on Artificial Intelligence AI and autonomy track* (2017) 4691-4697.

⁷²¹ Barysé and Sarel (n 11); Papagiannenas and Junius (n 662).

⁷²² Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108 *Proceedings of the National Academy of Sciences* 6999.

⁷²³ Shafeeq Ur Rahaman, 'Ethical AI in Data Science: Balancing Innovation and Responsibility in the Digital Age' (2024) 5 *International Journal of Leading Research Publication* 1.

errors or injustices caused by AI systems cannot be properly addressed. It is also sometimes argued that AI may also exclude certain groups, such as those without access to technology or digital literacy. This is why the artificial justice of the future must be accessible to all, regardless of socioeconomic status or technological proficiency. While AI has the potential to transform the legal system for the better, its ethical implications must be carefully addressed to ensure that it serves the interests of justice and society as a whole.⁷²⁴ Balancing technological innovation with ethical responsibility is key to building trust in AI-powered judicial systems.⁷²⁵

Therefore, if the introduction of AI-based solutions into the justice system is to be seriously considered, a number of significant new challenges must be faced in the new era of artificial intelligence. These include those related to the reliability of the software in making decisions of legal significance, the accountability of the machine or the ethical requirements associated with the application of artificial intelligence itself. In particular, ethics, in the context of technological advances in artificial intelligence, can contribute to creating a world with less bias and more justice. Experts in the field have already repeatedly noted the need to set ethical boundaries in the development and implementation of new AI-based tools. This refers to a certain set of moral principles that users of such solutions should be guided by when developing and using AI responsibly and fairly. Their application should be ensured by stakeholders, from engineers to administration in the justice system, in order to ensure responsible use for the purposes of individual actions in judicial proceedings. Avoiding prejudice, ensuring the privacy of users and their data, reducing the risk of errors - all this thanks to an appropriate regulatory framework will help to guarantee a state in which technology will serve society, thus enabling it to be used on a wider scale than before, perhaps also for judicial decision-making instead of humans.

It is the possibility of human intervention or supervision of the functioning of artificial intelligence systems in the judiciary, security, privacy, traceability, transparency, non-discrimination and accountability that will be the values whose assessment will be able to allow a decision to use a specific model of artificial intelligence in the judiciary. As one may think, artificial intelligence must be trusted, a number of preparatory steps have to be made

⁷²⁴ Renee Knake Jefferson, 'Lawyer Ethics for Innovation' (2021) 35 Notre Dame Journal of Law, Ethics & Public Policy 1.

⁷²⁵ Mary Baker and Husam Rajab, *Balancing Innovation and Ethics in AI Development* (Umm al-Qura University 2024) *passim*.

for the public to trust it. Given that much of the reliability of such systems comes from the quality of the data that is incorporated, care must be taken to ensure that it is correct, detailed and accurate. Consequently, as more and better data is incorporated into an automated system, the assessment of risk or threat will be more in line with reality and therefore the legal protection that needs to be provided in each specific case will be possible. Public trust and ethical considerations must be at the forefront of any such developments.

The mere introduction of AI into justice systems for the purpose of autonomous decision-making by AI would, it is believed, have profound and far-reaching effects on the legal system, society, and individuals.⁷²⁶ AI could process large volumes of cases quickly, reducing backlogs in courts and speeding up the resolution of disputes. AI systems could apply legal rules uniformly, reducing inconsistencies or biases that may arise from human judges' subjective interpretations. If designed properly,⁷²⁷ AI could minimize certain forms of human bias (e.g., racial, gender, or socioeconomic biases).⁷²⁸ Automating parts of the judicial process could also reduce the costs associated with traditional judiciary. Therefore, this seems to be a very tempting area for the judiciary. Implementing AI in judicial decision-making has the potential to significantly improve the efficiency of the judiciary in several ways.

4.5. *Summary*

As the discussion so far has shown, the use of artificial intelligence in the judiciary is already taking place today. The laws of individual countries, including those under broader analysis (Germany or Spain), are familiar with artificial intelligence-based solutions and are making increasingly bold use of them. Although there are countries such as Poland, where the approach to artificial intelligence systems is restrained, it is impossible to imagine today the development of legal systems, the judiciary, without the participation of new technologies, including artificial intelligence. Since artificial intelligence has the potential to mimic human thought, get close to human emotions, and at the same time can analyse countless amounts of data and can function

⁷²⁶ McInerney (n 9) 111 ff.

⁷²⁷ Eiichiro Watamura Id, Yichen Liu and Tomohiro Ioku, 'Judges versus Artificial Intelligence in Juror Decision-Making in Criminal Trials: Evidence from Two Pre-Registered Experiments' (2025) 20 PLoS ONE 1.

⁷²⁸ Saadia Afzal Rana, Zati Hakim Azizul and Ali Afzal Awan, 'A Step toward Building a Unified Framework for Managing AI Bias' (2023) 9 PeerJ Computer Science 1.

24/7, it may be an important remedy for the current shortcomings of the justice system related to its inefficiency. Furthermore, AI has continuous potential for development, which should also be recognised.⁷²⁹

The cautious approach of some states, or the different approaches of individual states to artificial intelligence systems, which can be explained by different types of factors, shows that in the future, the development of such methods of streamlining justice will be debatable and uneven at the level of individual states, including European states. This does not mean that states will reject this type of system; there is no clear reason for this in principle. Rather, what can be envisaged in the future is further observation of the solutions operating in the practice of justice, research into their functionality and its extension, which is rather a method of spontaneous harmonisation of the law based on observation of other systems and gradual transformation of one's own system.

In view of the above, it is reasonable to believe that the further use of artificial intelligence in the judiciary will take place as before, i.e. in a supportive and complementary form, slowly moving towards a substitute, decision-making form, in which artificial intelligence will perhaps replace the human judge. For it seems that it is already possible to discern areas in which the replacement of the human judge is not only possible, but also desirable, if only in connection with the issue of judicial efficiency. The progressive digitalisation of the justice system is one of those areas that is developing dynamically and which, in the not-too-distant future, may be considered a constitutional standard that every law-abiding legislator should aspire. Today's somewhat hybridised justice system is likely to evolve in the future to somewhere between artificial and human justice. The development of artificial intelligence, new theories such as the theory of goal-oriented actions or the emerging field of value awareness engineering are just some indicators of the possibilities this field holds. The increase and dissemination of knowledge about AI among the public and the concomitant increase in trust in this technology may be the prerequisites for the success of this idea in the practice of justice.

The algorithm may be designed to be subject to a jurisdictional order. Knowing the existing case law, in which the algorithm is able to find the

⁷²⁹ Dogan Gursoy and Ruiying Cai, 'Artificial Intelligence: An Overview of Research Trends and Future Directions' (2025) 37 *International Journal of Contemporary Hospitality Management* 1.

right path, it is possible to generate an impartial outcome that settles the legal position of the litigants. Such an algorithm, however, has to deal with the prevailing standards of the right to a fair trial. Exploiting the possibilities associated with the so-called '*glass box*' approach, based on making the AI process as transparent as possible, while at the same time basing practical solutions on the so-called explainable IA, which can be understood by a human, may be a step towards developing an AI model that is optimal from the point of view of resolving court cases, which already seems to be only a matter of time. Since, among other things, according to Article 27 of the EU AI Act, before the implementation of a high-risk artificial intelligence system (and AI in judiciary is such a system), it will be necessary to carry out an assessment of the impact of such a system on fundamental rights, an attempt must be made to indicate the criteria for such an assessment, which will be the subject of further consideration.

Chapter 5. Judicial decision-making *ex machina* in the light of the contemporary attributes of courts and judges. On the course to an efficient future of judicial proceedings in a democratic state

5.1. General remarks

The above considerations have shown that it is reasonable to strive, at various levels (including through scientific considerations), to increase the efficiency of court proceedings in order to realise the right to a fair trial or, as described sometimes more broadly, the right of access to justice. Over the last decade or so, it has become apparent in the various jurisdictions that different types of technical solutions have been used for this purpose, which in many cases have helped to improve the efficiency of the administration of justice. The state of the judiciary without digitalisation, with ‘analogue’ instruments, would be incompatible with the judiciary based on the rule of law in the 21st century. Legislators know this, citizens recognise it, and thus the existing standards for the administration of justice are evolving. Standards are also being created, oscillating around further technological tools.

One of the golden means for improving the efficiency of the judiciary, according to many, has recently turned out to be artificial intelligence.⁷³⁰ AI algorithms are capable of assisting various stages of judicial proceedings, from support in simple activities inherent in court secretariats, to support in legal research, the preparation of draft procedural decisions or, most temptingly, to the automatic adjudication of cases. The research so far, although often questioned, is yielding very interesting results. It is believed that the further development of artificial intelligence, which is still progressing at a rapid

⁷³⁰ Suárez Xavier (n 118) 385 ff.

pace, will bring even more interesting results.⁷³¹ It is therefore impossible to dismiss the possibilities that artificial intelligence offers for the justice system, especially in view of its inefficiency, its large (sometimes years-long) backlog of cases. Rather, further research should be carried out, aiming to outline an optimal model for the use of artificial intelligence in the judiciary, especially in view of the continuous development of AI.⁷³²

As the application of artificial intelligence algorithms to judicial decision-making seems to be the most tempting and at the same time the most advanced in this regard, only this area will be further explored. Since some statements of legal science suggest pilot solutions, consisting in selecting a certain category of cases to be decided by artificial intelligence, and then - if such experiments are successful - expanding the scope of application of such mechanisms, the following will consider which features of AI seem suitable for deciding cases that fall under court jurisdiction and whether AI-based solutions meet the constitutional standards of judicial authority. In other words, after analysing the contributions of legal science to date and empirically observing the functioning of the various artificial intelligence systems used in the judiciary of some countries, it is time to try to outline an algorithmic framework using AI capabilities for the adjudication of cases and to consider whether these capabilities can be incorporated into the system of judicial authority in accordance with the standards of constitutional law. This will be considered in this chapter.

5.2. Algorithmic reality and the legal basis for its possible operation in the judiciary

Moving on to the circled area of analysis, it should first be recalled that an algorithm is nothing more than a list of step-by-step instructions for performing a specific task or solving a specific problem.⁷³³ Algorithms are used, among other things, in programming, which is the process of creating instructions for a computer that tell it how to perform certain tasks. It is the art of turning an idea into a working solution. AI algorithms are complex programming routines designed to mimic human behaviour

⁷³¹ Elif Kiesow Cortez and Nestor Maslej, 'Adjudication of Artificial Intelligence and Automated Decision-Making Cases in Europe and the USA' (2023) 14 European Journal of Risk Regulation 457.

⁷³² Veronika Fikfak and Laurence R Helfer, 'Automating International Human Rights Adjudication' (2025) 46 Michigan Journal of International Law 69.

⁷³³ Robin K Hill, 'What an Algorithm Is' (2016) 29 Philosophy and Technology 35.

through a computer. Indeed, AI is a technology that allows machines to mimic human thinking and decision-making.⁷³⁴ According to a definition proposed, for example, by the OECD, an AI system is 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 can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment. In turn, AI knowledge refers to the skills and resources, such as data, code, models, research, know-how, training programmes, governance, processes, and best practices required to understand and participate in the AI system lifecycle, including managing risks.⁷³⁵

Modern artificial intelligence differs from earlier information technologies mainly in two ways. Firstly, the new technologies have the ability to learn, meaning that they can recognise patterns and discover new information without human assistance, as well as predict future events. Secondly, artificial intelligence can operate with a certain degree of autonomy.⁷³⁶ This means that it can make decisions on its own that have not been pre-programmed. These abilities are the result of mimicking human neural networks, as AI mimics the structure of the human brain. In this way, AI tools learn from large data sets and find solutions to problems that are not only unknown, but in many cases impossible to visualise.⁷³⁷ Learning, large data sets and a significant increase in computing power have led such tools to reach performance levels comparable to humans in academic and professional tests, not to mention exceeding human capabilities.⁷³⁸

Therefore, if an idea emerges in the public sphere that artificial intelligence should decide court cases, thereby replacing judges in their

⁷³⁴ Adriano Koshiyama and others, 'Towards Algorithm Auditing: Managing Legal, Ethical and Technological Risks of AI, ML and Associated Algorithms' (2024) 11 Royal Society Open Science 230859.

⁷³⁵ OECD Revised Recommendation of the Council on Artificial Intelligence, adopted by the Council at Ministerial level on 3 May 2024, C/MIN(2024)16/FINAL, available online at: <[https://one.oecd.org/document/C/MIN\(2024\)16/FINAL/en/pdf](https://one.oecd.org/document/C/MIN(2024)16/FINAL/en/pdf)> accessed 30 March 2025.

⁷³⁶ Tetiana Drakokhrust and Nataliia Martsenko, 'Artificial Intelligence in the Modern Judicial System' (2022) 1 Journal of Modern Educational Research 5.

⁷³⁷ Goretty Carolina and Martínez Bahena, 'La inteligencia artificial y su aplicación al campo del Derecho' (2012) 82 Revista Alegatos 827.

⁷³⁸ Karan Singh, *Principles of Generative AI A Technical Introduction* (Carnegie Mellon University: Tepper School of Business 2023) 1-12.

judicial duties, it will be necessary to develop an algorithm that enables such action, with functionality analogous to that of human judges. In simple terms, this involves understanding what a legal dispute is about, being able to process and analyse court records, relating this data to existing standards derived from the legal state, deciding how to resolve the dispute and justifying that decision.⁷³⁹ In order to do this, human judges have to graduate from law school, undergo targeted training, and demonstrate an appropriate level of legal knowledge. This usually takes about 10 years, from the start of their studies until they make their first procedural decisions, although this of course depends on the country and the system of legal education and the way in which judges are appointed, as there is no uniformity in this area, from country to country.⁷⁴⁰ The recruitment of qualified personnel to the judicial systems is a problem in many countries. According to numerous reports, having an adequate number of staff and a steady influx of new recruits to the courts is one way of making the judicial process more efficient.⁷⁴¹ This area therefore needs to be recognised by a computer scientist who would undertake to develop an artificial intelligence model that would be capable of replacing the human judge.

This task is not the easiest, as can be imagined. Hence, it may not be surprising that the first artificial intelligence models operating in the judiciary are not comprehensive models. As previous studies have shown, artificial intelligence has usually only been used for certain elements to help decide specific court cases, i.e. primarily as a tool to assist judges, not replace them. With the passage of time and ongoing evolution, however, artificial intelligence models are becoming increasingly advanced and are slowly beginning to aspire to something more than just supporting adjudication systems. Already today, there is increasing bold speculation of their possible autonomy and therefore autonomous judicial decisions.⁷⁴²

There is no doubt that artificial intelligence algorithms can analyse and process files. It should be recalled that natural language processing is an

⁷³⁹ Charles E Carpenter, 'Court Decisions and the Common Law' (1917) 17 Columbia Law Review 593.

⁷⁴⁰ Kate Malleson, 'Creating a Judicial Appointments Commission: Which Model Works Best?' (2004) 1 Public Law 102.

⁷⁴¹ Heike Gramckow, *Estimating Staffing Needs in the Justice Sector* (The World Bank 2012) 26 ff.

⁷⁴² DO Drozd, 'Judicial Independence and the Use of Artificial Intelligence in Courts' (2023) 2 M. Narikbayev KAZGUU University Law and State Journal 15.

area of computer science, linguistics and artificial intelligence research that enables computers to understand, interpret or generate human language. Most relevant, from the point of view of the judge's work, it also seems to be information retrieval, which enables 'intelligent' human-computer interaction.⁷⁴³ As research results in this area show, modern software solutions in this field require a good linguistic background, as the implementation of natural language communication between human and computer is a complex and difficult process. This emphasises that the use of natural language in information retrieval must always be considered in the context of a specific ethnic language. Natural language is a carrier of information that is strongly linked to the nation and culture of the user, and individual ethnic languages generate different problems related to their use in information-search systems. Without going into too much detail in this area, it should be pointed out that the research results obtained allow to claim that the process of automatic generation of document search characteristics can and should significantly support the process of cognitive (human-made) factual processing of documents and information. Proper document preparation, indexing and tagging (social description of document content) are elements that enable automatic extraction of information from large text collections and subsequent understanding of that information. For it to be possible to refer to artificial intelligence at all, a given IT system designed by a technician must have the ability to analyse and interpret data, which essentially means that the system can improve its performance and has the ability to learn.⁷⁴⁴

As it is known, and has already been mentioned, the ability to learn is realised within artificial intelligence through the use of programming techniques in the form of so-called machine learning. Machine learning is a set of techniques involving the processing of data. This data can be a pre-prepared set or it can be a stream of data processed in real time. Every artificial intelligence-based solution known today uses this type of programming in one of its many variations. Machine learning aims to reduce the complexity of data sets and detect patterns, which are then used to explain events, predict them or take action. With machine learning, a computer programme is able to run without the need for programming code.⁷⁴⁵

⁷⁴³ KR Chowdhary, *Fundamentals of Artificial Intelligence* (Springer 2020) 603-649.

⁷⁴⁴ George F Luger, *Artificial Intelligence: Principles and Practice* (Springer 2025) 243 ff.

⁷⁴⁵ Chowdhary (n 743) 375 ff.

Law is also a type of code, and what is more, it is a type of code that can be implemented in programming code. What seemed impossible until recently has now become real, and law implemented in code has been functioning successfully for many years. The traditional view and understanding of law is not sufficient today. The concept of law as a code,⁷⁴⁶ explaining that the legal system is made up of 'puzzles' that can be interconnected and shaped in cyberspace, has become real. The technologization of law and the transformation of the human language in which legal rules are promulgated to societies into programming codes that can only be read by machines equipped with computers and directly executed by these machines is now a reality. Moreover, this occurs without transcribing the computer code into symbols, into letters, words, phrases and sentences, in a way that can be directly perceived by humans. The transformation of law into programming codes is a new field of science that combines law and computer science, constituting what is known as legal engineering. In cyberspace, a structure created by computer scientists using codes and software that enables computers to function, connect and interact, legal regulations also apply. Thanks to the development of IT, what used to be published in paper books or promulgators of various kinds, today has a digital version and can thus be processed by computers. This applies not only to the law in force, but also to the jurisprudence based on it and to emerging scientific statements. Like a human judge, artificial intelligence can therefore access the sources of judicial decision-making, including, of course, case files. Once properly programmed, this data can be further processed. As is widely known, AI understands text through a combination of techniques from natural language processing, machine learning, and deep learning. There is no turning back from this, and further developments will only confirm the very effective use of AI for such purposes.⁷⁴⁷

Consequently, at least in the analysis phase, a well-designed artificial intelligence algorithm seems to be able to process case files correctly, conduct legal research, find similar cases, and search for previous rulings or precedents. Analysing court cases through artificial intelligence requires a structured approach that aligns with legal reasoning and the elements of a case. AI can analyse court cases from many perspectives. It can focus on the application of laws, statutes, and precedents, identify relevant legal

⁷⁴⁶ Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999) 3 ff.

⁷⁴⁷ Eduardo Magrani, *Entre dados e robôs: Ética e privacidade na era da hiperconectividade* (Arquipelago Editorial 2019) 10 ff.

principles and rules applicable to the case, as well as ensure compliance with constitutional and jurisdictional requirements. It is capable of extracting and analysing the facts of the case, including evidence, witness testimonies, and documentation, and determine the credibility and relevance of the facts presented. By using historical data and precedents to predict potential outcomes, artificial intelligence can offer comprehensive solutions, especially in routine cases that do not involve new problems and are characterised by a certain degree of typicality. AI itself, by performing an appropriate analysis of the case, is able to indicate whether it belongs to this type of case (typical ones, of which the AI model already has knowledge) and eliminate cases that do not present the designed characteristics.⁷⁴⁸

As for AI's judicial decision-making, the issue seems a little more complicated. To resolve cases algorithmically, AI systems should incorporate a few more steps than data collection and its preprocessing. In addition to extracting key information from legal texts and case documents, identifying legal concepts, facts and connections, artificial intelligence must use rule-based reasoning to interpret regulations and laws, use machine learning to identify patterns in case outcomes, and highlight potential risks and opportunities in a given case. The decision based on these elements, has to be free from biases and explainable.

In the context of judicial decisions made by artificial intelligence, this refers to fully automated decisions, i.e. decisions that produce an output without human involvement. This is often referred to as 'out-of-the-loop' decision-making.⁷⁴⁹ A distinction is also made between in-the-loop automated decisions, that is decisions made with human involvement, and on-the-loop decisions, that is decisions made with human oversight and who can override the automated output. The latter two categories can be referred to as semi-automated decisions, which - at least in some sense - serve as 'decisional aides' to human decision-makers.⁷⁵⁰

Generally speaking, legal science already considers that the development of artificial intelligence indicates two of its most important potentials in the judicial field: artificial intelligence can be a tool to assist the

⁷⁴⁸ Spalević and others (n 6).

⁷⁴⁹ The term was popularised by Danielle Keats Citron and Frank A Pasquale. Cf. Danielle Keats Citron and Frank Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 Washington Law Review 1.

⁷⁵⁰ McInerney (n 9) 103.

delivery of justice, or artificial intelligence can replace the role of a judge. Today, we already have AI systems that assist in the delivery of justice, which has already been discussed in detail. In the second area, on the other hand, the current state can be described as a transitional period, where individual systems are increasingly boldly entering the area hitherto reserved for the human judges. Admittedly, as is sometimes believed, or at least claimed until recently, AI cannot replicate certain abilities that are uniquely human (although perhaps it is only a matter of time), although it can mimic them to a large extent, but this does not mean that the 'art' of judicial decision-making cannot have a next stage of development, which would be large-scale *ex-machina* decision-making. Moreover, this can be expected to happen soon.

Artificial intelligence, like human knowledge, can evolve. Therefore, the data provided to artificial intelligence is fundamental to its training. Data resources are useful for training artificial intelligence as long as the datasets are of high quality, up-to-date and accurate. The more accurately the training data verifiably reflects reality, the better the AI model will perform.⁷⁵¹ The quality of the data is directly proportional to the quality of the results. In order to achieve this, it is necessary, among other things, to use standardised, compatible formats and protocols for the processing of data from different sources, which is strongly emphasised by Directive (EU) 2019/1024/EU of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, which may be helpful in this context in the area of national law formation. This is because there is no doubt that in such areas of application of artificial intelligence, such as in the administration of justice, it is necessary to know how an artificial intelligence algorithm achieves a specific result with the assurance of the reliability of the input source and the controlled results. Therefore, it is possible and at the same time necessary to shift the focus towards explainability understood as one of the principles of reliable (ethical, responsible) AI. For it is explainability that allows decision-making to be made more transparent, i.e. it makes it possible to state how AI 'made a particular decision' resulting in a particular outcome.⁷⁵²

This, moreover, seems to be the direction in which the first legal regulations devoted to these issues are heading. At this point, one can point

⁷⁵¹ Owain Evans and others, 'Truthful AI. Developing and Governing AI That Does Not Lie' (2021) 2110 ArXiv 06674.

⁷⁵² Bogdan Fischer and Marlena Sakowska-Baryła, 'Wykorzystywanie otwartych danych jako element zwiększenia wyjaśnialności AI' (2024) 53 Prawo i Więź 289.

to the first piece of ‘hard law’ comprehensively attempting to regulate the subject of AI, which is the EU AI Act. In its content, the starting point for the application of AI systems in practice is transparency. It implies that AI systems are developed and used in a way that allows for adequate traceability and explainability, while informing people that they are communicating or interacting with the AI system, as well as duly informing the applying entities of the capabilities and limitations of that AI system and the affected persons of their rights (Recital 27 EU AI Act).⁷⁵³ Article 13 of the EU AI Act, concerning transparency and the provision of information to applicators, states that high-risk AI systems shall be designed and developed in such a way that their operation is sufficiently transparent to enable applicators to interpret the system’s results and make appropriate use of them. The appropriate type and degree of transparency shall be ensured in order to achieve compliance by the provider and the applying entity with the relevant obligations. Therefore, among other things, the data used by AI should become the concern of public authorities, after all it is constitutive of the proper functioning of AI models. The use of public data resources can be done without harming the public interest and other legally protected interests, which is important in the context of AI systems in the administration of justice. Although some existing practices regarding the data used to train AI models and the explainability of their performance have been inadequate, the quality data that will be used to train AI helps ensure the accuracy and correctness of annotations, which together contribute to the explainability of AI. AI models, in order to meet the criteria appropriate in this context, to inspire public confidence in their functioning, must be adapted to a state where they are transparent and explainable.⁷⁵⁴

Adaptability, in this regard, is a characteristic of artificial intelligence systems based on machine learning techniques, which are specific to AI models used in the judiciary. Artificial intelligence systems can be trained on a one-off basis, periodically or continuously. Especially the latter of their capabilities is extremely important in the discussed context.⁷⁵⁵

⁷⁵³ Madalina Busuioc and Deirdre Curtin, ‘Reclaiming Transparency : Contesting the Logics of Secrecy within the AI Act’ (2023) 2 *European Law Open* 79.

⁷⁵⁴ Cecilia Panigutti and others, ‘The Role of Explainable AI in the Context of the AI Act’, *The role of explainable AI in the context of the AI Act* (2023) 1139-1150.

⁷⁵⁵ Samuel Becher and Benjamin Alarie, ‘LexOptima: The Promise of AI-Enabled Legal Systems’ (2025) 75 *University of Toronto Law Journal* 73, 74-121.

Considering the current state of scientific research in this area and the potential of artificial intelligence perceived therein, it is possible to imagine artificial intelligence models that will already meet the criteria necessary for the exercise of judicial authority. In the ongoing debate, there is an increasing search for the principles that should guide their creation and implementation in practice. Such principles have, for example, been attempted to be reconstructed in Europe, e.g. through the activities of the Council of Europe, as already mentioned.

It may be recalled here that the Council of Europe, already in a 2018 document *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems* - has identified five fundamental principles for shaping the practice of justice involving artificial intelligence. These are: (1) respect for fundamental rights, (2) equal treatment and anti-discrimination, (3) data quality and security, (4) transparency, impartiality and fairness, (5) operation of AI systems under user control. Currently, 'soft law' instruments are proliferating internationally as a kind of recommendations for the use of AI in practice. Such recommendations have been made, for example, by the OECD in 2019, adopting the *Recommendation of the Council on Artificial Intelligence*,⁷⁵⁶ UNESCO in 2021, adopting the *Recommendation on the Ethics of Artificial Intelligence*,⁷⁵⁷ G7 in 2023, adopting the *Leader's Statement on the Hiroshima AI Process*,⁷⁵⁸ World Economic Forum in 2023, adopting *The Presidio Recommendations on Responsible Generative AI*⁷⁵⁹, or the UN in 2023 and 2024, adopting the *Report Governing AI for Humanity*,⁷⁶⁰ and the *Resolution Seizing the Opportunities of Safe, Secure and Trustworthy Artificial*

⁷⁵⁶ 'Recommendation of the Council on Artificial Intelligence' (2019) <<https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449>> accessed 30 March 2025.

⁷⁵⁷ 'Recommendation on the Ethics of Artificial Intelligence' (2021) <<https://www.unesco.org/en/articles/recommendation-ethics-artificial-intelligence>> accessed 30 March 2025.

⁷⁵⁸ 'Declaración de los dirigentes del G-7 sobre el proceso de la IA de Hiroshima' (2023) <<https://digital-strategy.ec.europa.eu/es/library/g7-leaders-statement-hiroshima-ai-process>> accessed 30 March 2025.

⁷⁵⁹ 'The Presidio Recommendations on Responsible Generative AI' (2023) <<https://www.weforum.org/publications/the-presidio-recommendations-on-responsible-generative-ai/>> accessed 30 March 2025.

⁷⁶⁰ 'Governing AI for Humanity' (2023) <https://www.un.org/sites/un2.un.org/files/ai_advisory_body_interim_report.pdf> accessed 30 March 2025.

Intelligence Systems for Sustainable Development.⁷⁶¹ Mention should also be made of UNESCO's 2024 initiative open public consultation⁷⁶² on UNESCO *Guidelines for the Use of AI Systems in Courts and Tribunals*,⁷⁶³ and the European Commission for the Efficiency of Justice 2025 *Report on the use of Artificial Intelligence in the judiciary, based on the information contained in the CEPEJ's Resource Centre on Cyberjustice and AI*.⁷⁶⁴

All these documents refer with greater or lesser attentiveness to the principles of the use of artificial intelligence in various sectors of the economy, which also applies to the justice system. Among other issues, the need to formulate public policy in these areas and to develop and refine the elements necessary for its implementation, particularly in terms of institutions, regulation, ethics, talent and data, was highlighted. This debate is ubiquitous, and one of the issues raised is that new technologies often develop at a pace that exceeds the regulatory authorities' ability to respond. Hence, attention is drawn to the importance of 'soft law' instruments.⁷⁶⁵ It is also argued that it is extremely important that any regulatory initiatives or strategies concerning artificial intelligence, both at the legislative and regulatory levels, are tailored to the specific environment they will affect.

In many places, legal scholars continued or developed similar ideas, attempting to develop standards for the use of artificial intelligence tools in judicial activities. One of the most recent developments of this kind is the judgment of the Colombian Constitutional Court (*Corte Constitucional*) of 2 August 2024, T-323/2024.⁷⁶⁶ The Court formulated very interesting principles regarding the standard in question. These principles may make it possible to outline, based on the criteria presented, the obligations incumbent

⁷⁶¹ 'Resolution Seizing the Opportunities of Safe, Secure and Trustworthy Artificial Intelligence Systems for Sustainable Development' (2024) <<https://docs.un.org/en/A/RES/78/265>> accessed 30 March 2025.

⁷⁶² Available online at: <<https://www.unesco.org/en/articles/unesco-launches-open-consultation-new-guidelines-ai-use-judicial-systems>> accessed 30 March 2025.

⁷⁶³ 'Draft UNESCO Guidelines for the Use of AI Systems in Courts and Tribunals' <<https://unesdoc.unesco.org/ark:/48223/pf0000390781>> accessed 30 March 2025.

⁷⁶⁴ 'Report on the Use of Artificial Intelligence (AI) in the Judiciary, Based on the Information Contained in the CEPEJ's Resource Centre on Cyberjustice and AI' (n 515).

⁷⁶⁵ Peter Cihon and Jonas Schuett, 'Corporate Governance of Artificial Intelligence in the Public Interest' (2021) 12 Information 1.

⁷⁶⁶ *Corte Constitucional de Colombia*: 2 August 2024, T-323/24.

on the developers of artificial intelligence systems, the fulfilment of which allows for the implementation of such systems with respect for fundamental rights. As this Court considered the use of artificial intelligence in judicial decision-making, this area deserves detailed analysis.

Before doing so, however, it must be emphasised again that AI models can already today be relevant in judicial decision-making processes. This doesn't mean, especially *de constitutione lata*, that the use of such solutions currently falls within constitutional standards. Constitutional law is only beginning to resort to such solutions, and the manner in which they are implemented or emulated in traditional standards - still debatable - shows that various possibilities are opening, and with them new doubts are emerging. Similarly, it is unclear what place artificial intelligence occupies in current constitutional norms concerning the administration of justice.

5.3. AI judicial decision-making in the judiciary of the future according to the jurisprudence of constitutional courts

The pronouncements of the European constitutional courts to date have not managed to cover the problems of judicial decision-making by artificial intelligence in their broad spectrum. This is for obvious reasons, including the fact that such solutions are not yet widely used in practice in European countries and therefore cannot yet have a significant radiation on fundamental rights. This will take time. However, this does not mean that such radiation does not exist outside Europe.

Such concerns were raised, for example, in relation to the American COMPAS system mentioned earlier. In one case decided over a decade ago (in 2013), the state of Wisconsin charged a defendant with five criminal counts related to a drive-by shooting. The defendant denied involvement in the shooting but admitted that he had driven the same car that was used later that evening. He pleaded guilty to two lesser charges - 'attempting to flee a traffic officer and operating a motor vehicle without the owner's consent'. In preparation for sentencing, the Wisconsin Department of Corrections officer produced a report that included a COMPAS risk assessment. In its reasoning, the court referred to the COMPAS assessment in determining the sentence and, partly on the basis of that assessment, sentenced the defendant to six years of imprisonment and five years of extended supervision.⁷⁶⁷

⁷⁶⁷ 'State v. Loomis. Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing. Comment on 881 N.W. 2d 749 (Wis.)' (2017) 130 Harvard Law Review 1530.

The defendant filed a motion for post-conviction relief in the court, arguing that the court's reliance on COMPAS violated his rights. Because COMPAS reports provide data relevant only to particular groups and because the methodology used to make the reports is a trade secret, he asserted that the court's use of the COMPAS assessment infringed on both his right to an individualized sentence and his right to be sentenced on accurate information. He additionally argued on the right to a fair trial ground that the court unconstitutionally considered gender at sentencing by relying on a risk assessment that took gender into account.⁷⁶⁸

The Wisconsin Supreme Court rejected his fair trial arguments but admitted that judges must proceed with caution when using such risk assessments tools. To ensure that judges weigh risk assessments appropriately, the court prescribed both how these assessments must be presented to courts and the extent to which judges may use them. The court explained that risk scores may not be used 'to determine whether an offender is incarcerated' or 'to determine the severity of the sentence.' Therefore, judges using risk assessments tools must explain the factors other than the assessment that support the sentence imposed. The judiciary should use considerable caution in assessing the qualitative value of new technologies.⁷⁶⁹

Generally speaking, the use of such systems must be cautious and requires transparency, and the system itself and its algorithm should be transparent, which is not so obvious in the case of the COMPAS tool. The US court raised the point that judges should be a bias check on a tool itself designed to correct judges' biases. Discrimination or biasing an algorithm against a particular social group can undermine its basic functionality useful in deciding court cases.⁷⁷⁰

Some other jurisdictions also have questioned this aspect of AI-based judicial models. For example, in the discussion that has taken place in Australia, the decision of the Supreme Court of Western Australia in *Director of Public Prosecutions for Western Australia v. Mangolamara* is often cited, where the court expressed similar reservations vis-à-vis the

⁷⁶⁸ *ibid.*

⁷⁶⁹ Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond State v Loomis: Artificial Intelligence, Government Algorithmization and Accountability' (2019) 27 *International Journal of Law and Information Technology* 122.

⁷⁷⁰ Freeman (n 647) 75 ff.

bias with respect to indigenous tribes of Australia.⁷⁷¹ It is submitted in this connection that there is no evidence to show that AI tools are foolproof. It is a relatively common observation that the AI predictive models consider data sets with regard to social profiling reflecting existing prejudices against some communities, highlighting the need for additional safeguards.⁷⁷² Similar issues of bias and countering possible AI biases have been considered in India, among others.⁷⁷³ A common element of such views is the indication of the need for transparent application of algorithms, which may suggest the need to introduce other rules accompanying this process.

The most comprehensive and currently most interesting - as it seems - position on this issue is the aforementioned ruling of the Colombian *Corte Constitucional* of 2 August 2024, T-323/2024. This is a ruling that comprehensively treats the matter of the use of AI in judicial decision-making, pointing out the principles of artificial intelligence, its advantages and disadvantages, as well as the fundamental risks of its use in the judiciary for fundamental rights.⁷⁷⁴ This ruling is worth quoting in broader passages.

This presentation must begin by pointing out that, in the circumstances of the case, it was established that the minor child was diagnosed with autism spectrum disorder (ASD). The child benefited from various rehabilitation therapies. The child's mother submitted an application to the relevant social welfare authority requesting that the child be exempted from 'paying health care fees and surcharges', as, in her opinion, the relevant provisions of local law exempt persons with disabilities from paying health care fees and surcharges. In addition, she asked the entity to cover the costs of transport to her son's therapy and to guarantee comprehensive treatment for the child. She indicated that she does not have a permanent job and is a single mother. As a result of the internal proceedings before this body, she was classified

⁷⁷¹ Hannah McGlade and Vickie Hovane, 'The Mangolamara Case: Improving Aboriginal Community Safety and Healing' (2007) 27 *Indigenous Law Bulletin* 18.

⁷⁷² Vasiliki Papadouli, 'Artificial Intelligence's Black Box: Posing New Ethical and Legal Challenges on Modern Societies' in Angelos Kornilakis and others (eds), *Artificial Intelligence and Normative Challenges. International and Comparative Legal Perspectives* (Springer 2023) 39-62.

⁷⁷³ Navpreet Kaur, 'The Role of Artificial Intelligence and Technological Progress in India's Judicial System: Revolutionizing Justice' (2025) 1 *Lex Gazette International Multidisciplinary ResearchJourn* 1, 1-9.

⁷⁷⁴ Joseph Colmenares Ramírez, 'Desafíos éticos en la implementación de Inteligencia Artificial Generativa en la justicia: sesgos de datos e injusticia algorítmica' (2024) 10 *Revista Debates Jurídicos y Sociales* 33, 46.

as a person whose living conditions correspond to extreme poverty. The authority has not taken any steps to meet the claims indicated.

In the proceedings before the court of first instance, the social welfare authority argued that the minor did not belong to the vulnerable group, as the diagnosis of 'autism spectrum disorder' did not in fact imply a mental/intellectual disability that would justify the granting of the relevant benefits. The authority also explained that another entity could grant admission to the transport programme, while pointing out that there is no medical certificate confirming the child's entitlement to cover these costs. Finally, the authority objected to the order to provide comprehensive treatment, as it is based on a conclusion relating to future and uncertain events. It also submitted that it had not violated the child's rights in any way.

On 7 December 2022, the court of first instance recognised the child's right to health and to live in dignified conditions. Consequently, it ordered the authority to: (1) approve the cost of public transport or provide transport for the minor and an accompanying person to ensure that they are transferred to the appropriate facility and receive comprehensive treatment prescribed by the attending physician, and (2) take over the provision of health services that the minor will need in the future in connection with the diagnosis of 'autism spectrum disorder', without requiring co-payment or moderate fees, unless the parents have sufficient financial resources to cover them. As a basis for its decision, it took the view that since the case concerns a minor with a mental disorder, he is subject to special constitutional protection, as he requires a guarantee of effective access to treatment prescribed by a doctor.

On 30 January 2023, the second-instance court upheld the first-instance court's judgment, finding that the social welfare authority had failed to prove that the claimant had the financial means to pay for her son's medical expenses. The court therefore noted that in the present case, surcharges and co-payments constitute a barrier to accessing health services and it is therefore the task of the court to eliminate them.

In reaching this decision, the judge indicated that he has used generative artificial intelligence tools to 'extend the arguments of the decision adopted'. A transcription of the questions asked in the application by the judge and the answers provided by the *ChatGPT* 3.5 tool is included in the reasons for the ruling:

Judge: *Are minors with autism exempt from the moderate therapy fee?*

AI application response: *Yes, that is correct. Under Colombian law, minors diagnosed with autism are exempt from paying for therapy. This benefit is regulated by law [...] and applies to all public and private healthcare providers that receive funds from the general social security system.*

Judge: *Should tutela (constitutional) orders⁷⁷⁵ be granted in these cases?*

AI application response: *If a healthcare institution does not comply with the exemption from user fees for a minor diagnosed with autism, the person or their legal representatives may file a tutela action to protect their rights. Tutela is a quick and effective judicial mechanism to protect fundamental rights that are being violated.*

If it is proven that the right to healthcare of the child with autism is being affected by the requirement to pay co-payments, it is likely that the tutela action will be granted, and the healthcare institution will be ordered to comply with the exemption. However, each case is unique, and the final decision depends on the specific facts and circumstances of the case.

Judge: *In these cases, does demanding a co-payment act as a barrier to accessing healthcare services?*

AI application response: *Yes, in some cases, the requirement to pay co-payments can act as a barrier to accessing healthcare services for people diagnosed with autism, especially if they have difficulties obtaining an income or if their economic situation is precarious. The requirement to pay co-payments can prevent or hinder access to treatments and therapies that are essential for the well-being and development of children with autism.*

For this reason, the regulations in Colombia exempt minors diagnosed with autism from paying co-payments for their therapies, with the aim of guaranteeing access to these essential health services without financial obstacles.

⁷⁷⁵ *Tutela*, what can be recalled, is the right of action created in Colombian law to provide injunctive relief for protecting fundamental constitutional rights.

Judge: *Has the jurisprudence of the constitutional court made favourable decisions in similar cases?*

AI application response: *Yes, it is true. The Constitutional Court of Colombia has made favourable decisions in similar cases related to the exemption of co-payments for people diagnosed with autism. The case law has recognised the importance of guaranteeing access to essential health services for people with autism and has held that the requirement to pay co-payments can be a barrier to access to these services. The jurisprudence of the Constitutional Court is an important source for interpreting and applying the Constitution and laws in Colombia, and its decisions are binding on all public authorities and entities in the country. Therefore, favourable decisions in similar cases can be useful as a precedent for other cases in which the requirement to pay co-payments for people diagnosed with autism is debated.*⁷⁷⁶

The judge explained during the proceedings that, regarding the use of AI, his aim was not to replace the judge's decision, but to optimise the time spent in drafting judgments, once the information obtained had been confirmed. In this regard, in his affidavit in the case, the judge stressed that the decision was made by him and not by AI, which he consulted simply as another working tool after making his findings in a particular case. In this regard, he argued that the *ChatGPT* consultation was merely a supplement to the decision he had already made on the basis of classical judicial grounds based on judicial reasoning.

The constitutional court considered the case primarily in the context of a possible violation of the right to a fair trial. It emphasised that, in this context, procedure applied in a case by a judge based on an artificial intelligence tool such as *ChatGPT* raises at least two types of concerns. First, whether the body issuing the decision in the case was a human judge or was it AI. Secondly, whether the decision was properly motivated or whether it was the result of AI-generated reactions or hallucinations. It has been pointed out that these doubts lead one to wonder whether the use of AI to formulate questions and include the answers in the decision entails a violation of the right to a fair trial and, if so, whether it entails a procedural nullity resulting from such a decision.

⁷⁷⁶ Dialogue based on the search history according to the *Corte Constitucional de Colombia*: 2 August 2024, T-323/24 (n 766).

In the context of considering the right to a fair trial using artificial intelligence, the Colombian Court was tempted to make several general observations. Among other things, the court emphasised that technological advances in artificial intelligence have had a complex impact worldwide, spreading to all areas of human life, including legal practice and, within that, the judicial system. Indeed, the proliferation of artificial intelligence systems and their application in the judicial environment, both procedurally and substantively, is gradually paving the way for a new paradigm in the public service of justice. Hence the need to assess the conditions for implementing new technologies in the justice system, to ensure that this is done with respect for fundamental rights, including the right to a fair trial. In its opinion, the guarantees that make up the right to a fair trial should be one of the main avenues for examining artificial intelligence systems intended for use in the judicial system. However, the problematic aspects associated with new technologies mean that some of the guarantees of the right to a fair trial nevertheless prove more useful than others, obviously in the context of exploiting their advantages and controlling the risks associated with their implementation in the administration of justice. In particular, three types of guarantees are relevant, according to the Colombian Court: (1) the guarantee of the natural judge; (2) the guarantee of the justification of judicial decisions; (3) the guarantee of the fairness of the evidentiary process.⁷⁷⁷

The first of these guarantees appears to be extremely interesting in the context of the issue at hand. Indeed, in the view of the Colombian Constitutional Court, the right to a natural judge derives, *inter alia*, from Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights. With regard to the first of these provisions, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. In turn, according to the second provision, all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Pursuant to Colombian constitutional jurisprudence, in turn, the natural judge is the one to whom the constitution or the law has attributed knowledge of a particular matter, since respect for the right to a fair trial, embodied in the principle of natural justice, implies the guarantee

⁷⁷⁷ *ibid* § 81.

that the trial will be carried out by the officials and bodies that, in accordance with the provisions of the constitution, have the competence to do so.⁷⁷⁸ The obligation of the legislative body to designate the competent judge in advance is 'an absolute right which cannot be derogated from in any case', thus allowing citizens to know in advance the judicial body, the type of trial and the rules of procedure to which they will be subjected, thus preserving legal certainty and legitimate confidence in the administration of justice.⁷⁷⁹

The Colombian Court also cited a ruling by the Inter-American Court of Human Rights, which ruled back in 2009 that the guarantee of the natural judge is a constitutive element of the right to a fair trial, and that the natural judge derives his existence and jurisdiction from the law, therefore in a state governed by the rule of law only the legislature can regulate, through laws, the jurisdiction of judges.⁷⁸⁰

Against such a background, the 'right to a natural judge' was reconstructed by the Colombian Constitutional Court in an interesting way. It indicated that it consists of three elements: (1) a previously established legal judge; (2) judicial independence, which implies that no power, whether state, private or of any other kind, such as an AI, can influence the consideration of the case; and (3) impartiality in dealing with the case.

Regarding the scope of the previously established judge, the Colombian Constitutional Court indicated that it is essentially defined in two features: specialisation and predetermination. The first assumes that 'the legislator should consult, as a principle of sufficient reason, the nature of the body to which it attributes judicial functions'. For its part, the legal predetermination of the judge who will decide certain matters implies: (1) that the judicial body is previously created by law; (2) that competence has been attributed to it prior to the fact submitted for its decision; (3) that it is not a judge outside of any jurisdictional structure (*ex post*) or established solely to hear a case (*ad hoc*); (4) that the case is not referred to a special court if it falls within the ordinary jurisdiction or if the jurisdiction conferred on a specific judicial authority is not recognised. This definition also implies the

⁷⁷⁸ In this respect, the Colombian Constitutional Court referred to its previous judgments, including the cases C-030/2023 and C-429/2001. Cf. *Corte Constitucional de Colombia: 16 February 2023, C-030/23; Corte Constitucional de Colombia: 14 March 2001, C-429/01*.

⁷⁷⁹ *Corte Constitucional de Colombia: 2 August 2024, T-323/24 (n 766) § 203*.

⁷⁸⁰ *Corte Interamericana de Derechos Humanos: 17 November 2009, Barreto Leiva v. Venezuela, (2009) Corte IDH 206*.

prohibition of creating judges, courts or tribunals of exception. The guarantee of a previously established judge is intended to ensure that citizens know, before events occur, which official will be competent to hear their case. This sub-guarantee therefore refers to competence and prohibits the creation of *ad hoc* judges to examine a particular case, either because of the relevance of the facts - whether they are of little or great importance - or because of the individuals to be investigated.

With regard to independence and impartiality, the local doctrine has stated that these guarantees 'seek to control the judge's motives in the face of influences alien to the law that come from the social system; impartiality seeks to control the judge's motives in the face of influences alien to the law that come from the process'. It is possible, therefore, that the independence of the judge, when using an AI tool such as *ChatGPT*, may be affected by the biases of that tool, a product of the data with which it has been fed, or that, for the same reasons, it is not possible to verify the impartiality of an AI, if it is the AI that makes the judicial decision. In accordance with the above, a violation of the right to a fair trial could be generated, in its guarantee of natural judge, if the case is decided not by a judge but by an AI or if it affects the independence or impartiality of the judge, issues which will be explored below.⁷⁸¹

Within the framework of AI technologies and their implementation in judicial systems, part of the essential content of the guarantee of natural justice is the human condition that must assist the judge. In effect, the current institutional and regulatory design does not foresee the possibility of a (ro) bot judge and it is anticipated that this would raise unsolvable problems in terms of the application of higher principles and the guarantee of rights; in any case, the appeal to human decision is irreplaceable, as much as it is desirable that technologies respectful of dignity serve the public interest. As can be seen, the guarantee of the natural judge is a cornerstone of the superior legal system because it is an integral part of the right to a fair trial, but also because it seeks to realise basic attributes of the jurisdictional function such as legal certainty, impartiality, neutrality and independence in the administration of justice.

⁷⁸¹ Angelly Vanessa Basto Bejarano, 'Impacto de la inteligencia artificial en la argumentación jurídica: un nuevo paradigma de la administración de justicia' (2024) 11 ResearchGate 1.

In view of the above, in order to safeguard the guarantee of the natural judge, it is necessary to establish whether the implementation of AI in jurisdictional activity can lead to a substitution of the judicial operator to whom the competence to hear a certain matter was constitutionally or legally attributed. This is based on the understanding that jurisdiction refers to the power that the judge has to exercise, by authority of the law, a certain function and that, at present, there is no legal norm in the internal legal system that regulates the use of AI in the judicial system.⁷⁸²

According to the Colombian legal system, the natural judge must be a human and not a machine, so AI cannot supplant the judge in judicial decision-making, as this would imply the violation of the guarantee of the previously established legal judge, regardless of the complexity of the matter submitted to the jurisdiction's consideration. If the judicial decision is made by an AI, without assessment and determination by a judge, it will be invalid and the fundamental right to a fair trial will be violated.

A violation of the right to a natural judge - according to the Colombian Constitutional Court - is generated when the judicial officer uses AI to substitute the logical and human reasoning that he or she is responsible for carrying out in order to interpret the facts and the evidence, to justify the decision and even to adopt it. In such events there will be a substitution of jurisdictional power on the part of the AI and with it, the configuration of a violation of the right to a fair trial due to violation of the guarantee of a previously established judge. On the contrary, the use of AI in the judicial system for administrative and documentary management, as well as to support judicial management and the correction and synthesis of long texts, does not involve a transgression of the guarantee of natural justice because, in such events, the use of these technologies does not replace the essential work that has been attributed to the judicial official, consisting of knowing and resolving in depth the matter for which he or she was vested with competence. The foregoing is fulfilled, if it does not involve the creation of content or the interpretation of facts or evidence, much less the resolution of cases, and as long as there is subsequent supervision by an official or employee of the judicial branch.

⁷⁸² Laura Valentina González Castro and Andrés Camilo Rueda Martínez, 'Análisis de la inteligencia artificial en las decisiones judiciales en Colombia: Estudio de caso de la sentencia T-323 y proyectos de Ley radicados' (2025) 6 Revista de la Facultad de Sociedad, Cultura y Creatividad 1, 4 ff.

Thus, it is particularly important that when the natural judge makes use of AI tools, for the functions defined above, the criteria of (1) responsibility, (2) safeguarding the principle of legality and (3) suitability are met. Furthermore, it is worth noting that, as this is a subject characterised by constant and rapid development, the relevance of these considerations must be assessed over time, according to developments in the fields of regulatory standards and, of course, in technology.

Indeed, in the service of justice, these technologies could eventually be used for the purposes of: (1) administrative and documentary management (e.g. distribution, agenda for the scheduling of proceedings, digitisation and classification of files, reporting systems and case law search engines); (2) support for the judicial function, in activities that do not involve the creation of content or the interpretation of facts or texts, or the resolution of cases, as in the case of the *PretorIA* tool applied by the Colombian Constitutional Court in the monitoring of *tutela* action proceedings (e.g. referencing case law, following case law trends, analysing statistical data, identifying repetitive issues, interacting with users of the Judiciary, answering users' questions through a bank of pre-established frequently asked questions); (3) correction and synthesis of texts, provided that they are subsequently supervised by the legal operator to determine their accuracy, coherence and correct application. The use of AI for the above purposes has the potential to improve the well-being of public servants in the judicial branch and of the citizens who make use of this service, as it allows the provision of judicial services to be more efficient and effective. Without doubt, justice, without losing its majesty and independence, will progressively have to fit into a personal communication terminal, within a technological network that serves as its support, in step with the advance of an increasingly digitised society.⁷⁸³

The Colombian Constitutional Court also recognised several risks associated with the use of artificial intelligence systems, in the context of the guarantee related to the fair justification of judgments. It recognised, for example, that the possible falsification of the motivation of a judicial decision due to the use of artificial intelligence can occur when it produces hallucinations that are not perceived by the judicial officer, which can lead to a violation of the fundamental right to a fair trial. Artificial intelligence can produce textual content that is nonsensical or grammatically incorrect. In

⁷⁸³ Quintero Reyes and Cala Amaya (n 683).

the case of *ChatGPT* 3.5, the platform uses a database fed by public sources, licensed third-party data and information created by reviewers, which in principle does not guarantee that the information is linguistically, socially, culturally and/or economically up-to-date or relevant in the national context. *ChatGPT* 3.5 is not a tool licensed for the purposes of justice and that its responses do not correspond to a reasoned and specialised exercise of legal deliberation. This means that there is no control over its design, no knowledge of the information on which it has been trained, nor of the way in which it processes, nor access to it to learn or modify its algorithm. When using this type of technology, the user must ensure that the model acquired has been trained using up-to-date, sufficient and relevant data for the national case and relevant context, which is not the case with *ChatGPT* 3.5. Otherwise, a search of case law or analysis of the literature to justify a decision may produce erroneous, false or inaccurate results, full of uncontrolled and opaque biases, which may ultimately translate into an infringement of rights. Consequently, the use of a system over which one has no control, and which involves limited knowledge carries a greater risk of identifying hallucinations that may be induced by artificial intelligence. The above is particularly relevant given that the administration of justice requires special care to verify the veracity and reliability of the information consulted by the judge and his or her support staff. The use of artificial intelligence, which is not specialised and not administered by the judicial authority, raises too many risks, as false or inconsistent information may be used. The use of artificial intelligence may lead to incorrect or false results, which, when used in judicial decision-making, may lead to errors. Therefore, it is important that artificial intelligence is used considering the principles of transparency and explainability, because failure to comply with these rules would prevent citizens from analysing specific court rulings or taking appropriate legal action, thereby infringing their fundamental rights.⁷⁸⁴

It is essential that when artificial intelligence is used in judicial decision-making that everyone affected by the decision has an explanation of what technology has been used, how the specific technology works, what the benefits are, which will, among other things, be able to demonstrate the responsibility of the judge and inspire confidence in the solutions offered, while constituting a minimum imperative to guarantee the rights of the party. In any case of use of artificial intelligence, it is essential to disclose this and to explain what role the tool played in the decision taken. The

⁷⁸⁴ Corte Constitucional de Colombia: 2 August 2024, T-323/24 (n 766) § 264.

relevant explanation must be complete, detailed, comprehensible and convincing to the user of the system. Transparency is a fundamental pillar in the administration of justice in this respect. The judicial system should prioritise artificial intelligence tools that enable transparency in the use of these technologies. The burden of informing the public is not limited to indicating the tool being used in the administration of justice but consists of a concrete explanation of how the technology works.⁷⁸⁵

With regard to guarantees of the fairness of the evidentiary process in an AI-based jurisdiction system, the Colombian Constitutional Court highlighted the existence of the right to a fair collection of evidence as part of the right to a fair trial. This right implies a number of guarantees for the parties, including among others the right: (1) to present and request evidence; (2) to challenge evidence presented against them; (3) to the disclosure of evidence, insofar as this ensures the possibility of contradicting it, either through direct criticism of its demonstrative capacity or with support from other elements; (4) that evidence be decreed, collected and practiced based on the legal and constitutional standards established for this purpose; (5) that the official conducting the proceedings decree and practice *ex officio* the evidence necessary to ensure the principle of realisation and effectiveness of rights; (6) that the evidence incorporated into the proceedings be evaluated by the judge. Deciding and evaluating the evidence is a task that, at least in the current legal state in Colombia, must be performed by a human judge, the performance of which cannot be left to artificial intelligence. The use of artificial intelligence as a tool used in evidentiary proceedings requires high standards of verification of the information provided by artificial intelligence. The protection framework must aim to ensure that users of the judicial system are transparent about the use of their data by the judicial system and that sensitive data is processed with appropriate security measures.⁷⁸⁶

Consequently, when evaluating all three analysed components of the right to a fair trial, i.e.: (1) the guarantee of the natural judge; (2) the guarantee of the justification of judicial decisions and (3) the guarantee of the fairness of the evidentiary process, the Colombian Constitutional Court concluded

⁷⁸⁵ *ibid* § 265.

⁷⁸⁶ Luisa Fernanda Herrera Sierra, 'Resumen de la Sentencia T-323 de 2024 de la Corte Constitucional de Colombia sobre el uso de IA por jueces de la República' (2024) <<https://propintel.uexternado.edu.co/resumen-de-la-sentencia-t-323-de-2024-de-la-corte-constitucional-de-colombia-sobre-el-uso-de-ia-por-jueces-de-la-republica/>> accessed 30 March 2024.

that, when the court deems it necessary, the use of artificial intelligence systems is permissible, provided that it is done in a reasonable and balanced manner. This requires an approach to the protection of fundamental rights and also the application of ethical criteria. In assessing the issues of a possible violation of the right to a fair trial, the criterion of non-replacement of human rationality must be respected, and issues of transparency, accountability and privacy must be taken into account.

This has led the Colombian Constitutional Court to adopt the position that it is possible to use artificial intelligence in tasks related to the administration of justice, provided that the use of such tools does not replace non-delegable and irreplaceable jurisdictional tasks, such as those that require logical and human reasoning to interpret facts, evidence, justify a decision or adopt it. The use of artificial intelligence for such purposes would entail violating the guarantees of the natural judge, the independence of the courts and the due process of evidence by replacing a judicial officer. Artificial intelligence, on the other hand, could be used in the judicial system in the areas of administration and records management, as well as to support judicial management and text correction and synthesis. In such cases, the use of these technologies does not replace the necessary and irreplaceable work entrusted to judicial officials and staff. According to the Colombian Constitutional Court, the judges fail to fulfil their legal duties when, having used AI in a judicial decision: (1) they use it in the exercise of reasoning functions that are non-delegable and irreplaceable; (2) they are not transparent with the user of the administration of justice by revealing the use of AI and, in doing so, compromise the effective guarantee of their right to contradiction; (3) do not rigorously verify the reliability of the information supporting the reasoning behind the ruling, which may compromise independence or impartiality due to the biases and hallucinations of the AI; (4) do not take the necessary precautions to avoid the transgression of rights such as *habeas data* or privacy.⁷⁸⁷

Nevertheless, the Court pointed out that, in order to meet the challenges of modern times and control the risks associated with new practices, it would be advisable that the legitimate and sustainable use of new technologies in the Colombian judicial system be carried out through a specialised tool. For this reason, the Court not only did not reject such an eventuality, but in fact indicated that the authorities should be encouraged to make efforts that will

⁷⁸⁷ Corte Constitucional de Colombia: 2 August 2024, T-323/24 (n 766) § 298.

gradually lead to the implementation of their own AI platform, designed exclusively for the public function of the judiciary, which will contribute to the efficiency of judiciary and facilitate access to information, as well as reduce risks in terms of transparency, data protection, hallucinations and bias.⁷⁸⁸ The Court also stressed that its position in the ruling concerns an issue that is new to the judiciary, is also constantly evolving and is subject to rapid change. For this reason alone, the relevance of its considerations may change over time as this technological area continues to develop.⁷⁸⁹

In this situation, the Colombian Constitutional Court, taking into account the facts and legal circumstances of the case, concluded that there had been no violation of the right to a fair trial, despite the unauthorised use of AI tools. The Court pointed out that, with regard to this particular case, the second instance judge's decision was motivated by the 'traditional' parameters of legal argumentation. The ruling clearly shows that the judge had already carried out his own analysis of the case before introducing AI reasoning. Motivation, assessment of the facts, analysis of the evidence, application of the rules and decision-making were directly handled by the relevant judge. The use of artificial intelligence did not replace the judge or act on behalf of the judge, therefore there was no substitution of the exercise of the jurisdictional function by *ChatGPT*. For this reason, the proceedings in the case were not invalidated, which was the risk of acknowledging the accuracy of the opposing argument. On the other hand, in assessing the case on the merits, The Colombian Constitutional Court found that certain standards relating to the right to public health had been violated and, in this regard, partially upheld the minor's claims (as to the exemption of fees and transport).

The decision of the Colombian Constitutional Court shows, among other things, that the use of AI tools in the judiciary must be based on the principles of transparency, accountability and privacy. Transparency is fulfilled when the judicial officer: (1) informs the parties that it has used an AI tool during the course of the proceedings; (2) explains the reasons why it is familiar with the proper use of these technological tools, for example, it has received training, it has carried out specialised studies on the subject, etc.; (3) specifies the functioning of the AI system that was used, including, in particular, the capabilities of the AI and its limitations; (4) sets out all the

⁷⁸⁸ *ibid* § 299.

⁷⁸⁹ *ibid* § 300.

reasoning behind the use of an AI in an understandable, convincing, complete and specific manner; (5) discloses in an unrestricted manner the data used and the place that this information occupies within the judicial decision; (6) establishes the reasons why the AI system should be used, that is to say, an analysis of necessity and suitability is made regarding the use of AI.⁷⁹⁰

Responsibility must take into account the origin, usefulness and necessity of the information used, and the responsibility of the judge focuses in particular on verifying that the information is true, relevant to the case, consistent with the factual and legal assumptions and understandable to the judiciary and the individuals. It is the judge's responsibility to be trained and to understand the proper handling of these technologies within the administration of justice and their impacts. For this reason, the use of 'black box' algorithms should be avoided, where the input data and the result are known, but not the way in which the information is processed. Furthermore, the judge must ensure that the system used is trained with recent data that is sufficient and relevant to the local context or context of application and, if any type of inconsistency is found, it must be expressly stated in the judicial decision. In turn, privacy means that the judicial officer has the duty to safeguard and protect the confidentiality of personal and sensitive data that is brought to the attention of the administration of justice in order to fulfil the purposes of the judicial branch. Consequently, it is necessary to carry out an assessment of the risks involved in supplying this type of data to AI systems and to avoid its leakage, even more so when the technological tools are external to the functioning of justice or are not expressly authorised for judicial purposes.⁷⁹¹

This ruling has been and continues to be received with great interest in legal science, where its background indicates above all that the trend towards the use of various artificial intelligence tools in the judiciary is on the rise, which is linked to the global development in this field.⁷⁹² The inefficiency and ineffectiveness of the judiciary, on the other hand, are features of the judiciary that could justify the further use of AI tools, sometimes on the verge

⁷⁹⁰ Cano (n 28) *passim*.

⁷⁹¹ *Corte Constitucional de Colombia: 2 August 2024, T-323/24* (n 766) § 371-373.

⁷⁹² Maria Lorena Flórez Rojas, 'Artificial Intelligence in Judicial Decision-Making: A Comparative Analysis of Recent Rulings in Colombia and The Netherlands' (2024) 1 *Journal of AI Law and Regulation* 361.

of fundamental rights, as it were.⁷⁹³ The judiciary could benefit from the implementation of AI in judicial proceedings, especially in cases involving large amounts of information or technical complexity.⁷⁹⁴ Thus, despite the boundaries set by the Colombian Constitutional Court, practice may bring further use of such tools in a somewhat arbitrary manner, although also - in view of the Colombian Court's position - judges may also want to abandon such tools in order not to expose themselves to accusations of violating existing standards.⁷⁹⁵ It is crucial that judges maintain the transparency and clarity of their decisions so that the parties involved can understand the basis of the decision and fully exercise their procedural rights.⁷⁹⁶ What is lacking is a concrete regulatory framework to govern the use of artificial intelligence in the judicial sphere.⁷⁹⁷ The legislature needs to develop clear rules on the use of artificial intelligence in law, paying particular attention to transparency, accountability and the prevention of bias. In turn, the main challenge will be to strike a balance between integrating technological tools into the judiciary to make judicial decisions and preserving fundamental rights. Meanwhile, the Colombian Constitutional Court opened up a space for discussion on how technological tools can coexist with legal principles, stressing that their implementation must be careful and responsible. For further consideration of the possibility of using artificial intelligence for judicial decision-making, an approach that prioritises the protection of fundamental rights in judicial decision-making is therefore needed.⁷⁹⁸

Undoubtedly, the Colombian Constitutional Court highlighted the importance of AI in judiciary systems. The decision itself is a groundbreaking decision, indicating in principle that judges should not overly rely on AI systems, as this could compromise the right to a fair trial and the judiciary's independence and integrity. The Colombian Court warned that when specific data is simply copy and paste without a review, it cannot

⁷⁹³ Laureano Urrea Zabala, *Uso de la Inteligencia Artificial (IA) en las decisiones judiciales y en la valoración de la prueba* (Universidad Cooperativa de Colombia 2024) 5 ff.

⁷⁹⁴ Cano (n 28) 13 ff.

⁷⁹⁵ Carlos Suárez, 'Uso de la inteligencia artificial en la toma de decisiones judiciales' (2024) <<https://godoycordoba.com/en/uso-de-la-inteligencia-artificial-en-la-toma-de-decisiones-judiciales-2/>> accessed 30 March 2025.

⁷⁹⁶ Sierra (n 785).

⁷⁹⁷ Laura Carrasquilla-Díaz, Alejandra De Luque-Pisciotti and Esteban Lagos-González, 'AI Adoption in Colombian Legal Practice: Challenges and Opportunities' (2024) 241 *Procedia Computer Science* 508, 509 ff.

⁷⁹⁸ Cano (n 28).

only be incorrect or inaccurate, but also false. However, this does not mean that such solutions should be rejected. On the contrary, one should rather strive to develop standards that respect fundamental rights in a dimension appropriate to the current technological age in which humanity currently finds itself. In addition to various popularisation efforts to build public confidence in such systems, which seems essential, it is also necessary to create training spaces that promote learning about AI in the judicial context, along with its risks and benefits, all with a rights-based perspective. The intersection of AI and judicial decision-making has long been a focal point within the realms of AI and law, the decision under study underlines the transformative potential of this new system - as well as of other systems that may be presented or acquire more popularity in the future - within the domain of judicial decision-making.⁷⁹⁹

The world's first comprehensive ruling by the Colombian Constitutional Court on the framework for the use of artificial intelligence in the judiciary shows at least this much, namely that the constitutional law standards for courts and judges, which primarily fall under the right to a fair trial, which have already been outlined and discussed, clearly require reinterpretation in the age of artificial intelligence. With this in mind, it can be predicted that the coming years will be characterised by uncertainties caused by constitutional doubts that will arise from time to time and will be resolved primarily by individual constitutional courts, which will have to address the issue of guarantees of the right to a fair trial in this context. It is already worthwhile to devote a number of comments to this area and to consider whether the risky use of technology by the courts in the context of judicial decision-making *ex machina* may be done within constitutional standards. In other words, the following comments will situate *ex machina* decision-making within the standards of the right to a fair trial. This, in turn, will allow to consider whether there are constitutional barriers whose removal should possibly be considered for the implementation of artificial intelligence systems for the purposes discussed. The fact that AI systems should be used to enhance the efficiency of the judiciary, considering the potential of this technology, seems to be difficult to question.

⁷⁹⁹ Riccardo Perona, Yezid Carrillo and De Rosa, 'Unveiling AI in the Courtroom: Exploring ChatGPT's Impact on Judicial Decision - Making through a Pilot Colombian Case Study' (2024) 39 AI & Society.

5.4. *AI judicial decision-making ex machina and the right to a fair trial*

As it is clear from the discussion so far, within the right to a fair trial and its integral part in the form of the right to access to justice, there are distinctive components that make up the necessary qualities of the courts and judges. It is a truism to assert that courts are to be independent and that judges are to be independent and impartial.⁸⁰⁰ The constitutional guarantees of individual states (e.g. Article 103(1) of the German Basic Law, Article 24 of the Spanish Constitution, Article 45 of the Polish Constitution), the provisions of acts of international rank, including e.g. Article 6(1) ECHR or Article 47 CFR have so far created these standards in a rather technology-neutral manner.⁸⁰¹ Never before, however, has there been so much argument that traditional courts with traditional judges are somewhat *passé*, not only in the context of prevailing fashion, but above all in the context of the day-to-day ability of these courts to decide cases.⁸⁰² Long-established trials in the face of possible efficient, short and at the same time highly-technological judicial proceedings seem to have trouble standing the test of time. This can be seen in the jurisprudential activities of individual states and their court systems, where various AI-based solutions are being implemented at various stages, moving inevitably towards the most advanced stage of this implementation - AI judicial decision-making.⁸⁰³

The standard of an independent court in the face of artificial intelligence needs to be adapted to the requirements of the modern age. However, the question arises as to the nature of this adaptation. Indeed, it has been shown that artificial intelligence is, in principle, capable of being part of bodies whose task is to settle disputes (legal protection) in the system of a given state, capable of generating a response to an individual's request for determination of his or her legal status, thus being able to perform the tasks of bodies that are responsible for exercising jurisdiction. It has also been clarified that it is possible to organise (it is feasible) such an algorithmic system to carry out the tasks of the courts in resolving particular categories or elements of court cases. Therefore, in this respect, should it be the courts that should be adapted to the capabilities of artificial intelligence, or artificial intelligence

⁸⁰⁰ Knaga (n 285).

⁸⁰¹ Silveira and others (n 247) 2 ff.

⁸⁰² Kieffaber, Gandall and McLaren (n 35).

⁸⁰³ Laptev and Feyzrakhmanova (n 11) 400 ff.

to the needs of the courts? It seems that the answer to the problem posed in this way should aim at the need to indicate the necessary metamorphosis of both areas. Just as the courts of the future should change, so should the artificial intelligence algorithms used in them correspond to the desired judicial standards.⁸⁰⁴

If the court of the future, as a court using algorithms to make decisions, is to continue to fulfil the attribute of an independent court, it is necessary to synchronise the work of computer scientists and lawyers in order to develop an appropriate system used to resolve cases. An appropriate system is one that will inspire confidence in citizens, who will understand how it works, be aware of its possible advantages, be aware of its possible disadvantages and, consequently, have appropriate legal mechanisms in place to respond appropriately to automated court activities. While popularisation and training activities are necessary, in order for the court of the future based on algorithms (artificial court) to meet the standard of an independent court under national constitutions and acts of international law, it is necessary to shape its activities in a way that is, above all, transparent.

In order to be able to speak of meeting this standard, a solution based on the concept of human-in-the-loop, meaning human participation in the administration of justice by an artificial court, is sometimes indicated as a panacea. This is the tenor of the existing, albeit modest, case law on standards of this kind. Both in the US case of *Loomis v. Wisconsin*, where the COMPAS tool was analysed, and in the Colombian Constitutional Court's decision, it was generally accepted that the AI tool should only be one of the many factors 'considered and weighed' at sentencing. The allure of the human-in-the-loop approach is the promise of human accountability when mistakes are made.⁸⁰⁵ This, in turn, is believed to be the result of the prevailing view that the control of machines in matters of administering justice is essential. This approach postulates the importance of human oversight over AI systems and their effects.

An issue that, in the context of trust in the administration of justice, needs to be recognised and, in principle, clarified each time as to functionality is the interaction of algorithms with humans, data and other algorithms. In various possible configurations, human intervention is regarded as a key element. Usually this type of human intervention must amount to more

⁸⁰⁴ Becher and Alarie (n 755) 75 ff.

⁸⁰⁵ McInerney (n 9) 107.

than a token gesture. This is about human action as a safeguard for when the algorithm gets things wrong, or when more information is required to make an appropriate decision. In this context, for example, the EU AI Act refers to human oversight as a strictly necessary component of risk mitigation where high-risk AI systems are deployed. Mainly this is to assess how such an approach can ameliorate the impact of AI systems on fundamental rights. This is also the overtone that emerges after reading the existing 'soft law' on the matter. For today, regulators believe that a human-in-the-loop approach can work as a sufficient safeguard against the potential pitfalls of relying on algorithms alone.⁸⁰⁶

It seems that in the first phase of the introduction of AI models aimed at judicial decision-making, such an approach will be necessary. The algorithm should not be completely autonomous, because then it may lose in the eyes of the public its suitability to resolve disputes in general. Only pilot AI models, convincingly functioning in certain categories of courts and court cases, can be a trigger for the use of AI for judicial decision-making on a wider scale. The introduction of these systems should therefore be gradual and, in the course of this introduction, respect for fundamental rights, as traditionally understood, from which a departure in favour of new technologies seems gradually possible, should be borne in mind. Evolution rather than revolution is always a good way to introduce revolutionary solutions.

In order to assess whether an artificial court meets the standard of independence, it will be necessary to explain to the public on which technology its functionality is based, with an algorithm made transparently available, which anyone at his or her knowledge could analyse.⁸⁰⁷ The algorithm must be publicly available, it must not be controlled by a private entity, it must be in the hands of the judiciary. Perhaps then, bodies such as national judicial councils (or their equivalents) should be the ones tasked with constructing the teams competent to develop the algorithms and supervise them during their use by the courts. Indeed, usually these councils are hybrid bodies, composed of representatives of different authorities, with a majority participation of the judges, and their primary purpose of functioning is to ensure the independence of the judiciary. For although bodies of this kind are not strictly bodies of judicial self-government, the participation in

⁸⁰⁶ Diamandis and Kotler (n 689).

⁸⁰⁷ Donghee Shin, 'Toward Fair, Accountable, and Transparent Algorithms: Case Studies on Algorithm Initiatives in Korea and China' (2019) 26 *Journal of the European Institute for Communication and Culture* 274.

them of representatives of other authorities or the method of their election based on democratic legitimacy allows for public confidence and increases transparency, which cannot fail to be important in this respect.⁸⁰⁸ In judicial systems, the upholding of the independence of the judiciary by the judicial councils could therefore concern the future and the algorithms. These bodies could thus be institutionally responsible for upholding the principles of transparency and fairness in the construction of an algorithmic judiciary and then overseeing the correctness of their functioning, training, data feeds etc.

The availability of training data is another consideration. Machine learning systems, which include the current AI algorithms that allow judicial decision-making, typically need access to significant amounts of training data to perform. It seems that also national judicial councils (or their equivalents) are entities whose task should be precisely to train the algorithms used in the judiciary. Jurisprudence of courts, statements of doctrine, laws - a specific public institution should feed the artificial intelligence model with this data. Although there is a tendency to entrust this kind of activity to other specialised agencies, such as the Spanish Artificial Intelligence Supervisory Agency (AESIA), established in 2023, the first institution of its kind to supervise AI models,⁸⁰⁹ the possibility of entrusting supervisory tasks in the judiciary to such agencies should rather be ruled out in order to guarantee the independence of the judiciary.

Also in this way, the biases of algorithmic justice can be counteracted. Through public scrutiny, while respecting the principle of transparency of AI systems, various possible biases can be eliminated at the AI training stage. If the first step in using algorithms for judicial decision-making should be the use of systems based on the human-in-the-loop concept, an appropriate follow-up control of the algorithm by a human, in whatever dimension, could allow to minimise the risks involved.⁸¹⁰

Participation in artificial court proceedings linked to the openness and publicity of court proceedings may also play a key role for the legitimacy of decisions taken by artificial intelligence. In other words, the possibility of the individual's participation in judicial proceedings, linked to the openness

⁸⁰⁸ Miraut Martín (n 119).

⁸⁰⁹ Alejandra Artero Muñoz, 'Agencia Española de Supervisión de la Inteligencia Artificial, la clave para un desarrollo tecnológico ético, justo y sostenible Contexto' (2023) 25 *Revista Española de Control Externo* 32.

⁸¹⁰ Završnik (n 514).

of court proceedings, seems to be one of the cornerstones of the proper functioning of traditional courts in today's world, which seems to be reflected in Article 6 ECHR, or in individual constitutional regulations (e.g. Articles 19 and 103(1) of the German Basic Law, Article 24 of the Spanish Constitution, Article 45 of the Polish Constitution). Nevertheless, the balance between the individual's Article 6 ECHR rights and other competing interests may be struck differently. As has already been mentioned, it is increasingly common for closed judicial proceedings to be allowed, which are sometimes accepted, for example, in the Strasbourg standards, as already mentioned.⁸¹¹ For the implementation of this standard, it seems to be sufficient if a party to the proceedings before the court is ensured to be treated as an autonomous subject of the specific proceedings, and not only in the context of the subject matter to be judged by the court. The ability of a party to participate in the proceedings and the possibility of effectively challenging the outcome would seem to be sufficient to meet such a standard. In turn, it is precisely these elements that shape the image of an independent judiciary that seem to be most under threat in the era of judicial automation. Indeed, there is undoubtedly a tendency to undermine the effective participation of parties in the courts, which has been taking place for a long time through, *inter alia*, the ubiquitous digitisation of the judiciary.⁸¹²

Participation in the administration of justice itself, in many countries, due to the increasing specialisation and complexity of the law, does not seem effectively possible without professional legal assistance. A party who understands little of the intricacies of the legal system is unable to navigate the courts on his or her own today.⁸¹³ Paradoxically, artificial intelligence in this respect can make a lot of difference and even improve a party's situation if the algorithms are properly structured. The transparency of artificial intelligence models can therefore also have such an additional social dimension.

The benefits of artificial judiciary, from a constitutional perspective, are moreover numerous. Apart from streamlining proceedings, which seems obvious, as an important value that cannot be overlooked - also in the context of the right to a fair trial - is the predictability of jurisprudence,

⁸¹¹ *European Court of Human Rights*: 3 April 2019, *Gulamhussein and Tariq v. United Kingdom*, App. No. 46538/11 and 3960/12.

⁸¹² Cf. Matyas, Wills and Dewitt (n 443).

⁸¹³ Linda H Morton, 'Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It' (1992) 25 *University of California Davis Law Review* 283.

uniformity. Despite some drawbacks of AI models, the prospect of technical standardisation of judicial decision-making processes can be seen as a guarantee of greater legal certainty for society. As it seems, and as studies on the subject suggest, artificial intelligence should apply judicial decisions uniformly in analogous cases, with which such systems should gain social credibility.⁸¹⁴ This would implement the principle of equality before the law, which is mentioned in virtually all modern constitutions (e.g. Article 3(1) of the German Basic Law, Article 14 of the Spanish Constitution, Article 32 of the Polish Constitution). Its ideal model is the claim that every legal norm should always be applied in the same way in all similar cases.

Furthermore, an algorithmic system would introduce equality between the different judicial bodies, obviously in the sense of uniformity of the entire judicial jurisprudence, a value that is difficult to overestimate in democratic legal states. Uniform and consistent judicial jurisprudence is able to do much to raise the social evaluation of the judiciary and therefore to increase confidence in it. By allowing full consideration of all possible sources and legal opinions, algorithms could therefore offer the possibility of realising the universality of law based on equality which could increase the legal certainty of the parties involved. This is because algorithms always follow the logic of pre-programmed legal dogmas (in principle without the possibility of deviation) and determine outcomes solely on the basis of rational decision criteria in a strictly logical procedure. They therefore recognise neither personal preferences nor dislikes, if they are correctly programmed, of course. The current situation in the judiciary of many countries, the heavy workload of the courts, reveals widespread concerns about the perceived lack of legal certainty caused by a sense of dependence on uncontrollable individual circumstances and personal preferences in the administration of justice. Humans, as social beings, *de facto* can never act free from social and cognitive influences, in which some advantage of AI models can be seen.⁸¹⁵ However, this is where the characteristics of justice come into play, which, among other things, relate to emotions and empathy, which are considered

⁸¹⁴ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 25) 103.

⁸¹⁵ Elisabeth Paar, 'Künstliche Intelligenz und richterliche Unabhängigkeit - Eine verfassungsrechtliche Standortbestimmung am Beispiel des Zeugenbeweises' in Ruth Greve and others (eds), *Der digitalisierte Staat - Chancen und Herausforderungen für den modernen Staat*, vol 104 (Nomos 2020) 311 ff.

essential in the administration of justice. However, as already indicated in this work, current AI models can also fulfil these qualities.

Uniformity of jurisprudence is certainly an advantage, even if it were to apply only to certain categories of cases, especially in the first stage of the idea of the implementation of judicial decision-making *ex machina*. At the same time, divergence of jurisprudence is a normal feature of judicial systems, with courts of different categories and hierarchies, among others, existing to prevent divergence of jurisprudence. Futuristically, it may therefore be necessary to rebuild the judicial hierarchy as well, should it turn out that the pilot solutions would work in everyday practice.

Also, thanks to such qualities of the algorithmic (artificial) judiciary, there is no doubt that it can have a proper distance from the litigants, which is an essential element in assessing whether the court in question is independent. The greatest threat to the independence of the courts in society is, after all, the possible influence of the executive or legislature on their daily functioning. Pressure from political circles or social organisations is a major problem for courts today. The situation would change if artificial courts were introduced. Admittedly, unavoidable influences may also occur with algorithmic decision-making systems, but in a completely different form. Acts of computer crime, computer sabotage or covert manipulation of data, but also simple errors in the system that are not recognised or are recognised too late can penetrate the decision-making sphere of an algorithm in a manner comparable to the opinions of a pluralistic society and enable targeted influence on judicial decision-making. Artificial courts would therefore have to be under the control of no authority other than the judiciary, while being adequately secured. Robust security systems are also the subject of significant discussion today, with the need for close monitoring of access, the existence of security to prevent tampering with the functioning of algorithms. According to available technical knowledge, however, such systems are possible to construct.

The establishment of artificial courts, if carried out transparently, will allow for a proper citizen's assessment in the context of the procedures for its establishment without prejudice. To this end, legislation should introduce specific rules to be followed on such an occasion. Together with the role of a public body upholding the independence of the judiciary, a workable mechanism can be imagined for the creation of artificial courts that is socially acceptable and of which it will be possible to say that it is a 'tribunal

established by law' ('artificial tribunal established by law?').⁸¹⁶ This criterion seems to be the bedrock of public confidence in the judiciary. An artificial court must correspond in this sense to at least the following characteristics: equality; quality; balance; and accountability. Artificial courts can certainly contribute to improving compliance with the principle of equality, while offering a certain stable quality to the jurisprudence they produce. The feature of desirability of balance does not seem to be violated in this context, especially as algorithms seem to guarantee it to a greater extent than humans, provided of course that they are properly designed. What is debatable, on the other hand, is the feature of accountability that the court should bear for its actions. Institutionally, it is possible to shape artificial courts in such a way that little will change in this area. Theoretically, then, the standard of an 'independent tribunal established by law' is the standard achievable by an artificial intelligence model dedicated to judicial decision-making.

In the context of access to independent courts, it should be further pointed out in a complementary manner that artificial courts would also allow for the improvement of this parameter of justice, which from a constitutional perspective cannot be indifferent. The need for efficient access to judicial proceedings and the effective and speedy handling of these proceedings derives from the constitutional standard of the right to a fair trial and its component in the form of the right to access to justice. Access to justice can therefore be improved in this way.

An essential element of independent courts is, as is well known, the judges, who should enjoy public confidence, which is expressed above all in the qualities of their independence and impartiality. The concept of independent courts, at least *prima facie*, cannot exist without impartial and independent judges who form the judicial panel.⁸¹⁷ Meanwhile, in the case of judicial decision-making *ex machina*, there are no traditional judges. The machine makes decisions on its own. The role of traditional judges in this area may be different. They can control the decisions of the machine. It is debatable whether this should take place at the level of first-instance proceedings or at another stage, while ensuring that citizens have two instances of justice. However, one can already try to defend the futuristic view

⁸¹⁶ Luisa Hedler, *Time, Law, and Tech. The Introduction of Algorithms to Courts of Law* (Copenhagen Business School 2023) 111 ff.

⁸¹⁷ Cf. Yehonatan Givati and Israel Rosenberg, 'How Would Judges Compose Judicial Panels? Theory and Evidence from the Supreme Court of Israel' (2020) 17 *Journal of Empirical Legal Studies* 317.

that current research into the development of artificial intelligence - from the perspective of the characteristics used by humans for the administration of justice - makes it possible to replace humans with algorithms. This - it seems - is still a distant practical prospect, but from a theoretical point of view it is tempting to take it up. The right to a natural judge, the right to a human judge - currently seen as the basis of the right to a fair trial⁸¹⁸ - may have a different dimension and need to be reinterpreted.

The need for algorithmic judicial decision-making may be linked to judicial staffing deficits in some countries, especially when the workload of the courts increases. As pointed out, for example, in Germany, the demographic trend and the associated deterioration of the staffing situation in the courts, or even in the legal services sector, may in the future force an even more daring approach in this area. In a scenario where there are inadequate numbers of human judges, the problem of access to justice and the length of judicial proceedings could become much more acute and thus compromise the right to a fair trial standard. Without algorithms acting as judges, the constitutional objective of ensuring unconditional judicial review of an individual's claim, which has its origin in the provisions of many European constitutions (e.g. Articles 19 and 103(1) of the German Basic Law, Article 24 of the Spanish Constitution, Article 45 of the Polish Constitution), might not be achievable.⁸¹⁹ In a black scenario, it is even pointed out that a human judge would be a kind of luxury that society could not necessarily afford in all categories of cases (in the future), especially since, given the increasing number of cases in the courts, the quality of human decisions might turn out to be worse than at present. For this reason alone, faster and potentially higher quality *ex machina* litigation decisions could have a positive impact on the system as a whole. As the private sector makes extensive use of *LegalTech* tools, the judiciary should also be prepared for this. Otherwise, its inefficiency and ineffectiveness could worsen.⁸²⁰ If the use of alternative dispute resolution methods, often based on online technology, is becoming more widespread, at least in some countries, it is necessary to recognise the growing public confidence in such solutions. The algorithmic

⁸¹⁸ Dyzenhaus (n 365).

⁸¹⁹ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 25) 115.

⁸²⁰ *ibid* 116-117.

judge is therefore no longer a taboo subject today and its possibilities are increasingly less 'exotic'.⁸²¹

In such a scenario, where the wait for justice lasts for years and courts with human judges are inefficient (as is already the case in some countries today), despite significant constitutional objections pointing to the need for cases to be decided by a human judge, one may nevertheless wonder whether deciding cases by algorithms in place of humans would not be a milder breach of standards, an appropriate remedy for the shortcomings of justice, compared to not providing legal protection at all. Undoubtedly, algorithms, in repetitive cases (as explained so far) that arise *en masse*, would allow for easier and more efficient adjudication of these cases. While it is true that, under constitutional law, effective legal protection cannot be measured solely in terms of efficiency categories, the complete absence of such protection, or the granting of it after many years, may lose its importance for citizens.⁸²² Algorithmic justice could remedy this situation and even strengthen the right to a fair trial, but only if the independence and impartiality of the judiciary are guaranteed, no longer belonging to a specific person, but rather as institutional guarantees.

The problem of whether AI-based solutions can be integrated with constitutional standards related to the exercise of judicial power seems complicated. After all, the basic condition for such integration would be the compatibility of a particular AI model with the attributes of a human judge, at least in terms of the constitutional functions performed by a human judge. Meanwhile, as the examples of some countries, including in particular Germany, Spain and Poland, show, judicial power is linked to the 'monopolistic' position of judges, who in constitutional orders can now only be human, essentially without exception. This is at least the common opinion in this area.⁸²³ The provisions of the German Basic Law (especially Article 92), the Spanish Constitution (especially Article 117) or the Polish Constitution (especially Article 178) are rather unambiguous in this respect. However, if it were possible to attribute the qualities of a human judge to an artificial intelligence, one could consider a change in this paradigm, a reinterpretation of sorts.

⁸²¹ Hedler (n 815) 176 ff.

⁸²² Sourdin and Burstyner (n 491) 48 ff.

⁸²³ Cf., e.g. Wolff, 'Der menschliche Richter und sein verfassungsrechtlicher Wert - Eine neue Perspektive algorithmischer Konkurrenz' (n 8) 159-168; Polo (n 126) 66 ff.

In this context, it should be noted, *inter alia*, that the constitutional guarantees of independence and impartiality of the judge are primarily aimed at protecting judges from professional and personal disadvantages, in order to ensure their comfort in the administration of justice, the belief that they are able to fulfil their duties. Independence has first and foremost the function of enhancing the status of judges, while impartiality is linked to the public's trust in the judge, the belief that he or she will not favour either side in a dispute. Looking at the algorithms through this prism, it is impossible to *prima facie* question their suitability for independence and impartiality (although many comments have been raised in this regard in the academia).⁸²⁴ Moreover, it is apparent that this area is opening up to new opportunities and, at the same time, new risks. The latter can and must be eliminated,⁸²⁵ which seems already possible today as a result of the correct construction of an impartial algorithm.

As pointed out in legal science, several concerns can be outlined in relation to algorithmic judges, without resolving and guaranteeing which it will be difficult, if not impossible, to use artificial intelligence systems as a substitute for the judge in the future.⁸²⁶

Firstly, it is about the impartiality of the judge in the relationship to the case, the parties and the participants in the proceedings. Impartiality establishes the obligation to resolve the conflict objectively, without taking part in it, i.e. without any personal or professional connection with the parties or the subject of the dispute. In the case of the algorithm, it is arguable that this impartiality will derive primarily from the statistics of the cases on which the algorithm has learned. Here, it is argued that the technicians-creators of the artificial intelligence system may leave reflections of their own views in the system, and it is with this that the risk of breaching the impartiality standard is raised.⁸²⁷

⁸²⁴ Cf. Jana Soukupová, 'AI-Based Legal Technology: A Critical Assessment of the Current Use of Artificial Intelligence in Legal Practice' (2021) 15 Masaryk University Journal of Law and Technology 279, 279-300.

⁸²⁵ Chronowski, Kálmán and Szentgáli-Tóth (n 279) 169-189.

⁸²⁶ Such doubts have also been raised by me in several places. However, due to the passage of time and a certain evolution of views, the constantly developing functionalities of artificial intelligence, noticing these deficits already today, one can try to indicate that AI models are capable of mastering these deficits. Regarding deficits see e.g. Szanciło and Stępień-Załucka (n 156) 226 ff.

⁸²⁷ *ibid* 227.

Secondly, the same can be attempted against algorithms in the context of judicial independence, as it is still a problem to separate artificial intelligence from the interference of other authorities. This is due to the fact that in its creation, an algorithm has certain indications as to its methodology and may be susceptible to take into account biases imposed by the legislative or executive branch. AI technicians can also ‘smuggle’ their preferences into these systems. This barrier, which legislation must break out of in order to make free use of AI systems for the purposes described, must be resolved, if only by entrusting this area of activity to the judicial councils, as was mentioned above.⁸²⁸

Thirdly, it is difficult to speak of a judge’s independence when it is to be based on the statistical conduct of a category of cases, as one would expect the conduct of an algorithmic judge to be.⁸²⁹ As is often argued, each case differs from the others in its details, but sometimes it is these details that make it unique. A judge has a moral conscience, social experience, common sense and empathy. If the judge is a human being, there is a chance that he or she will notice these details, in the case of an algorithm this may be different. The intellectual operations carried out by the judge to apply the general law to a particular case are not automatic on the basis of his or her knowledge and experience, but the opposite. The choice of the most equitable solution is a manifestation of the judge’s commitment to society, to the legal system he or she serves. Indeed, the judge’s decision represents his or her commitment of a specific nature to the parties and of a general nature to society as a whole. His or her decision resolves the conflict, providing the required judicial protection, all in a responsible manner as the judge is held accountable for his or her decisions.⁸³⁰ The artificial intelligence system, at least in the dimension known so far, decides without an emotional component. Artificial cognitive operations are still usually performed in the complete absence of feelings and emotions. Rather, the algorithmic judge in the dimension known so far from practice is rather unemotional, unmoved by what it perceives from the outside, because it perceives nothing from the outside, nothing that is not present in the databases that serve as sustenance. An artificial intelligence system offers its predictions or solutions based on the analysis of an infinite number of previous cases in similar circumstances, looking for patterns that it applies automatically. In this context, it is also possible to speak of

⁸²⁸ *ibid* 228.

⁸²⁹ *ibid*.

⁸³⁰ Dimitrova and Dimitrova (n 362) 245-258.

a kind of barrier inhibiting the application of AI in the judiciary, although, as indicated previously, emotional AI is already at the threshold.⁸³¹

Finally, among the legal guarantees of judicial independence in light of the deficits raised against artificial intelligence, the irremovability of judges⁸³² deserves special attention. The constitutions establish the impossibility of dismissal, suspension or transfer except in cases expressly provided for by law. Thanks to irremovability, those holding judicial office can exercise their function without fear that the direction of their decisions may affect their careers. In the context of artificial intelligence, it is difficult to have such guarantees, which also - at least *prima facie* - seems to be a significant obstacle that needs to be addressed (new approach).

All of this may be, at least for some time, a significant barrier to the introduction of changes into legal systems and the enabling of the administration of justice by an artificial intelligence algorithm. These problems need to be analysed precisely in the context of the qualities of independence and impartiality of judges, necessary attributes for the administration of justice, which would allow an AI model to emerge that meets the indicated criteria of right to a fair trial, for which AI is ready today.

An algorithmic judge, like a human judge, can act under a statute, be bound by its content. Thanks to machine learning and deep learning systems, the algorithmic judge can understand its content. The algorithm can be structured to be subject to the jurisdictional order. Knowing the existing case law, in which the algorithm is able to find the correct procedural path, it is possible to generate an impartial adjudication that will settle the legal position of the parties to the dispute. This adjudication will be an essentially reproducible adjudication in the sense that it will refer to existing case law, if the algorithm is so designed. The objections directed in this connection as to the lack of independence, the inability to reach a non-template decision - which are sometimes raised against such systems - may be a real obstacle, at least *prima facie*, to synchronising the capabilities of algorithms and current constitutional standards. However, developments in the legal science around artificial intelligence show that this need not be the case, and that the algorithm can operate creatively, whereby independence understood in

⁸³¹ Ossowski and Fern (n 5).

⁸³² Cf. Joanna Derlatka, 'The Right to Freedom of Expression and the Irremovability and Appointment of Judges - Democratic Standards of the Council of Europe Council' (2018) 61 *Zeszyty Naukowe KUL* 95.

this way would not be compromised. Concerns about this standard, raised not long ago, may be all the lessened because independence is nevertheless more about counteracting external influences (as the study so far shows) than creating new jurisdictional concepts. The creativity of the judge is of course important, but not necessarily essential in a specific factual situation.⁸³³ These problems, in turn, would have to be studied precisely in a concrete case, whereby the creative action of an algorithm obviously seems possible, especially with the appropriate construction of an algorithmic judiciary, as developments in technology today already allow. Thus, potentially also this necessary attribute of judicial authority can be attempted to be attributed to an algorithm.

Today's concept of a judge, undisputedly as it seems, the concept of a human judge, perhaps needs to be reconsidered. The legal solutions indicated so far that shape the position of the independent and impartial judge, not only at the constitutional level, but also at the level of international and European law, such as according to Article 19(1) TEU or Article 47 CFR, as well as Article 6(1) ECHR refer primarily to the human figure of the judge. However, a detailed reading of them no longer leads to such seemingly obvious conclusions. Finally, the significance of international instruments has a rather institutional dimension, after all they primarily refer to the court and not to judges. At the same time, these provisions speak about the results and the requirements (the court is to be independently established by law) and not about the methods of establishing a system of judicial legal protection. The sources of European and international law are therefore not generally suitable for confirming the obvious thesis that a judge is to be a human being, but they can and are used as an important yardstick for substantive criticism of algorithmic decision-making systems, for example with regard to fairness, independence or impartiality.⁸³⁴ They do not, however, show any clear impediment to accepting that human-programmed tools, constructed to adjudicate court cases, cannot perform the tasks envisaged for humans. As long as it takes place under human control, if the decision-making parameters are identified with human will, if this will can be attributed to humans, it seems that the concept of judicial decision *ex machina* discussed in the above cannot be rejected. The issue is, of course, in the details, but an algorithmic judge corresponding to international

⁸³³ Roger J Traynor, 'The Limits of Judicial Creativity' (1977) 63 Iowa Law Review 1.

⁸³⁴ Wolff, *Algorithmen als Richter. Verfassungsrechtliche Grenzen entscheidungstreffender Rechtsgeneratoren in der Rechtsprechung* (n 25) 133.

standards already seems conceivable, at least as far as the tasks the judge has to perform are concerned. The different wording of some constitutions, although it may be the result of the legislator's concept, may not be able to hold up when confronted with the realities of the future. Already today, moreover, there are those who believe that the wording of the constitutions suggesting the administration of justice by a human judge is not at all so obvious, since the reference 'personal' (or similar) can only be applied to the general conception of the judge as an individual subject of state power. At times, moreover, this 'personal' status becomes an obstacle to the fair administration of justice, as human decisions - as opposed to an algorithm - can be influenced by various factors concerning human existence.⁸³⁵

Even as constitutional provisions indicating the necessity of the administration of justice by human beings are some expressions of trust in human individuals, it should be taken into account that they were created at a time when new technologies did not pretend to perform such tasks as the administration of justice. Today, in the modern world, after another industrial revolution, when the whole world uses solutions much more efficient than those based on the human mind and its capacities, when this is commonplace, for example, in law firms,⁸³⁶ also in the area of judicial authority the new paradigm of the judge cannot be regarded as something absurd. The high obviousness of the thesis proclaiming that a judge should be a human being is increasingly being met with circumstances that question the thesis. So while the drafters of the current German, Spanish or Polish constitutions could not have foreseen such an eventuality, this does not mean that today or in the near future, a look at the concept of the judge will have to recognise the competence and importance of artificial intelligence.

Today, it is also not at all clear - against the background of constitutional standards - that human judges should be able to use artificial intelligence tools to support their judicial decisions.⁸³⁷ This is because the degree of complexity of the individual tools may in fact lead to the substitution of human action, which, however, will not be adequately disclosed to the outside world. Examples of the use of artificial intelligence in judicial practice seem to provide such arguments that, in reality, although a particular decision

⁸³⁵ *ibid* 140.

⁸³⁶ Cf. John Armour and Mari Sako, 'AI-Enabled Business Models in Legal Services: From Traditional Law Firms to next-Generation Law Companies?' (2020) 7 *Journal of Professions and Organization* 27.

⁸³⁷ Brożek and others (n 553) 429 ff.

is signed by a human, it is in fact the artificial intelligence that decides the case. This can be explained by a desire to streamline proceedings or, as in the case of a Colombian judge in a social welfare case that reached the country's Constitutional Court, by the need for time to resolve other cases. This is not to say that the current state of the *acquis constitutionnel* allows for such actions.

In this context, independence and impartiality can therefore be significantly challenged, and not necessarily accepted in society. However, the use of various AI-based tools is today's reality in many courts in various countries, and the extent of the use of these tools will continue to grow in the coming years. Whether the use of these tools can bring about a change in the approach to the concept of the judge therefore seems to be only a rhetorical question today. The obviousness of the concept of the human judge already seems to be a bit of a mental shortcut, not to say an anachronism, even as the use of artificial intelligence is still neglected in this area.

Thus, as one may think, already today, trust in the impartiality, the need for objectivity of judges are qualities that can be ensured in an analogous way by algorithmic judges. The elimination of bias, the elimination of exerting influence on the decision, effective substantive legal protection, fair decisions are potential characteristics of algorithmic judges exercising justice in the artificial courts of the future. Although there are currently no provisions of constitutional rank that would unambiguously allow judicial decisions to be made by artificial intelligence, the automation of judicial decisions, if only in certain categories of cases, which can be seen as a first step towards a fully automatic judiciary, seems possible and desirable. In constitutional law, no explicit prohibition can be seen for the existence of algorithmic judges, who could perform the same functions as human judges (even if such a prohibition were established, it would have to be postulated to revoke it). Although, of course, the traditional concepts in this area as to the authority of judging are based on the person of a human being, as is evident, *inter alia*, from the historical development of the law in this area, today - in the face of the increasing power of new technologies - the necessity of the administration of justice by a human judge is only defensible in the face of vague, non-transparent and immature technological solutions that mimic human action unsatisfactorily. In the case of advanced systems, in spite of the sometimes indicated significant risk to fundamental rights, a reinterpretation of the principles governing this area should lead to a more favourable functioning of the judiciary to new technologies, especially since

the existing concerns are increasingly not confirmed by scientific research on the functionality of artificial intelligence.

If areas of legal disputes can be found where independent algorithmic decisions are possible, even if only in some subset of the tasks normally envisaged for judges in traditional courts, then it will be possible to use the benefits of new technologies for their resolution, even in the current *de constitutione lata* state of affairs, although this will of course depend on the specific solution that can be applied. The existing and changing factual and legal situation, open to the surrounding and developing new technologies, may influence the assessment of the constitutional acceptability of specific technologies in the administration of justice.⁸³⁸ Concerns about the lack of independence and impartiality of algorithmic judges, eagerly presented only a few months ago, are generally not - due to the progressive development of AI - still valid today. Technology is changing its face at an astonishing pace. It just needs to be able to be used appropriately.

It should be added that state action can promote the development and diffusion of technology, or it can effectively restrict it.⁸³⁹ In the longer term, individual legislators will have to decide what regulatory action to take in response to technological developments. Concerns about algorithmic activity, stemming - as one might think - primarily from a lack of confidence in such models, must not obscure the possibilities and effects that artificial intelligence can bring to this area of life.⁸⁴⁰ To eliminate these fears, these solutions need to be disseminated, which is a long-term process. For although concerns about the adequacy of some AI systems as regards meeting the qualities of independence and impartiality may often prove to be valid, especially in the face of tools already in practice, it is technologically possible to construct an AI model that meets standards.

For today, in view of the ever-growing concerns and probably still some reluctance in European countries to use AI systems on a large scale, it may be postulated that artificial intelligence algorithms should be used in the judiciary, inter alia also for making judicial decisions, directly or indirectly. This should be done while respecting the qualities of independence and

⁸³⁸ Cf. Arthur Selwyn Miller, 'Technology, Social Change, and the Constitution' (1964) 33 *George Washington Law Review* 17.

⁸³⁹ Cihon and Schuett (n 765) 1-30.

⁸⁴⁰ Huw Roberts and others, 'The Chinese Approach to Artificial Intelligence: An Analysis of Policy, Ethics, and Regulation' in Luciano Floridi (ed), *Ethics, Governance, and Policies in Artificial Intelligence* (Springer 2021) 47-79.

impartiality as understood in line with modern requirements. Whether specific solutions meet such standards will certainly be the subject of many more cases pending before constitutional courts.

5.5. Implementation of AI models making judicial decisions ex machina

The discussion so far shows that the use of artificial intelligence tools in the judiciary is a reality. It streamlines court proceedings, increases the possibilities and scope of assessing specific behaviours subject to a judge's decision, allows for effective analysis of multi-volume documents, enables the prediction of a specific decision or allows for the appropriate judicial decision to be made. This is certainly a path from which there is no turning back, just as the digitalisation of this area cannot be abandoned. Nevertheless, as has been attempted to show, the use of AI tools can also and does encounter some barriers, particularly evident in the area of fundamental rights.⁸⁴¹ These barriers relate to the very algorithmic technology on which they are based, its characteristics, as well as the constitutional standards for the exercise of judicial authority. Some AI systems may not adequately meet the requirements that constitutional law imposes on courts and judges to adjudicate cases of individuals and to fulfil the functions envisaged in a democratic state for bodies exercising the administration of justice. Undoubtedly, this is an area of many challenges, starting somewhere in the dilemma as to which value, i.e. justice delayed or efficient justice with minor infringements of fundamental rights, is the value worthy of promotion. As it seems, however, the use of AI in the judiciary does not necessarily involve minor infringements of fundamental rights, even in the context of judicial decision-making, if the AI model is properly constructed.

Barriers based primarily on the concepts of judicial independence and the independence and impartiality of judges, still raised in many places, treated as significant obstacles to the functioning of AI models in the judiciary, although they must be borne in mind, must not obscure the overall expected benefits of using systems of this kind. Moreover, and this seems even more important, artificial intelligence can already meet the requirements of constitutional law, provided that an appropriate model meeting the specified standards is developed and that these standards are

⁸⁴¹ Kusche (n 19) 3 ff.

interpreted in the spirit of the times in which humanity currently lives.⁸⁴² In any case, given the problems facing the justice system, the millions of cases awaiting resolution, the schedule of the first court hearings over the next few years, and the use of simplifications in procedural decisions by judges in order to deal with a larger number of cases, everything indicates that, given the current state of the justice system, there is currently no other option. It is therefore necessary to postulate the creation of an AI model that, using the known techniques of machine learning, deep learning, natural language processing, applying the theory of goal-oriented actions, based on the field of value awareness engineering, will eliminate bias directed in any direction, and will allow for the resolution of a specific case, whose operation will take into account the context of the '*glass box*' and will be understandable within the framework of human-explainable artificial intelligence theory. As one might think, the road to creating such an AI algorithm model is not far at all, as evidenced by the achievements of AI resulting from currently published research results in this area.

Sceptics of the use of AI systems in the judiciary must accept that artificial intelligence is an area that is constantly evolving, whose capabilities and functionalities are growing, and without which the effective administration of justice is no longer - in principle - possible today. The increasing number of cases in the courts, the lower efficiency of staff, their deficits - these are phenomena for which a remedy is being sought in individual countries, something that is currently very much needed.⁸⁴³ This remedy could be artificial intelligence. The remedy must be artificial intelligence. For there is no alternative today to the objective of increasing the efficiency of judiciary within a reasonable period of time. However, artificial intelligence must be properly designed. Not all AI models, especially many of those that have been used in the judiciary to date, meet the necessary criteria. This is not entirely extraordinarily the case, especially since in individual countries there are already - on a full scale - bodies carrying out tasks specific to judges and courts, sometimes referred to as magistrates (judges), although their fulfilment of the criteria of independence as to the court, independence

⁸⁴² Cf., however: Elaine Mak, 'Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (in-)Flexibility' (2011) 4 Erasmus Law Review 193.

⁸⁴³ This is not a new problem, as these issues have already arisen in previous stages of the development of law and society. Cf., e.g. Edward R Finch, 'Speeding Up the Courts' (1939) 15 Tennessee Law Review 596.

and impartiality as to the judges, seems debatable, but they nevertheless administer justice.

These include the so-called ‘probationary judges’ or ‘judges on probation’, known, *inter alia*, to the Spanish, German or Polish legal systems. Their legal status in the context of the constitutional standards of the right to a fair trial may be questionable. It can be pointed out that in Spain, according to the *Ley Orgánica* 6/1985, while new judges serve as *practicantes judiciales* (Articles 307-309), where they work under supervision and when their performance is evaluated in the lower courts (*juzgados de primera instancia* or *juzgados de instrucción*), or when they work as *jueces temporales*, one may wonder whether this system fully guarantees judicial independence under the rule of law. The situation is similar in Germany, where § 12 of the *Deutsches Richtergesetz* allows for the appointment of a temporary judge (*Richter auf Probe*), which seems questionable from the point of view of guaranteeing the exercise of judicial office and independent procedural decision-making, especially as the evaluation of the judicial performance of these judges may be decisive for their further professional development.⁸⁴⁴ The status of a judge exercising the judicial authority ‘on trial’ may therefore raise doubts as to his or her fulfilment of the role of a neutral representative of a third authority, which decides a dispute according to objective criteria. In Poland, on the other hand, where there is an institution known as the ‘*asesor*’,⁸⁴⁵ this institution has been recognised as incompatible with Article 45(1) of the Polish Constitution (right to a fair trial). At that time, the Polish Constitutional Tribunal pointed out that the right to a fair trial also includes the right to appropriate shaping of the system and position of the bodies adjudicating cases, and the possibility of dismissing an *asesor* is constitutionally questionable in this context. Most interestingly, however, the Polish Constitutional Tribunal, in assessing the discussed institution of *asesor*, noted at the same time that the provisions of the Polish Constitution do not explicitly contain a rule entrusting the administration of justice exclusively to judges or stating *expressis verbis* that the courts are to be staffed exclusively by judges in the constitutional sense of this word.⁸⁴⁶ From this it may follow that entrusting the exercise of judicial power to persons with

⁸⁴⁴ Wittreck, *Die Verwaltung der Dritten Gewalt* (n 104) 438 ff.

⁸⁴⁵ Maciej Hadel, ‘Powrót asesury sądowej - rozważania w kontekście aksjologicznych uwarunkowań prawa do sądu i wykładni norm konstytucyjnych’ (2018) 4 Internetowy Przegląd Prawniczy TBSP UJ 135.

⁸⁴⁶ Trybunał Konstytucyjny: 24 October 2007, SK 7/06 (2008) OTK-A 9.

a status similar to that of judges, with the formal attribute of independence in adjudication, does not directly constitute a violation of the constitutional status of a judge or of the principle of independence in its material sense.⁸⁴⁷ This is the result of accepting what can be called the concept of a 'statutory judge'. In this context, it is pointed out, *inter alia*, that it is conceivable to create a body to which the legislator gives the name 'court' and to whose competence is delegated the adjudication of a certain category of cases. The law may confer on such a body the features of adjudication shaping rights and freedoms and introduce its own 'statutory' rules for the validity of certain actions, providing for the public authorities to be bound by them.⁸⁴⁸

The Polish Constitutional Tribunal also pointed out that, from a practical point of view, the principle of having court formations staffed exclusively by judges could conflict with some of the tenets of the right to a fair trial. First and foremost is the injunction to decide a case without undue delay. In the view of the Constitutional Tribunal, in practice there may be situations in which, for organisational reasons, the adjudication of cases is prolonged, creating a state of unjustified delay. There may also be situations when the scope of cases to be resolved by a given court increases in a manner inadequate to the previous staffing of judges. The principle of efficiency in the operation of state organs and public institutions would therefore indicate the need for a certain flexibility of solutions, striving for an actual and effective reconciliation of the requirements of the right to a fair trial, rather than an absolute emphasis on only strictly formal requirements, in the form of the right to have a case decided by a human judge. The Polish Constitutional Tribunal pointed out in this regard, for example, that in practice the administration of justice in civil cases is carried out not only by courts, but also by arbitration courts composed of persons who are not judges and have no guarantees of independence. The Tribunal stressed that the guarantees of independence and impartiality therefore do not necessarily extend to the extra-constitutional powers of the courts.⁸⁴⁹ This concept seems to be moving in the direction of the position taken in the case law of the

⁸⁴⁷ For example, in Polish legal science, in light of this ruling, the admissibility of imposing a penalty in criminal proceedings involving an algorithm is indicated. Cf. Jakub Kisiel, 'Konstytucyjność algorytmicznego wymierzania kary w prawie karnym w Polsce' (2021) 3 *Czasopismo Prawa Karnego i Nauk Penalnych* 57.

⁸⁴⁸ Włodzimierz Wróbel, 'O sędziach i sądach w rozumieniu Konstytucji i w rozumieniu ustawy' (2025) <<https://konstytucyjny.pl/wlodzimierz-wrobel-o-sedziach-i-sadach-w-rozumieniu-konstytucji-i-w-rozumieniu-ustawy/>> accessed 30 March 2025.

⁸⁴⁹ *Trybunał Konstytucyjny*: 24 October 2007, SK 7/06 (n 845).

European Court of Human Rights that ‘a court may be composed wholly or partly of persons who are not professional judges’⁸⁵⁰. The constitutional provisions are therefore not intended to completely exclude the introduction of further exceptions to the said principle, entrusting the administration of justice to persons whose legal status refers only to the constitutional position of a judge.⁸⁵¹ Perhaps artificial intelligence can also be accommodated in this standard. Such exceptions must be justified by a constitutionally legitimate objective and be within the limits of achieving that objective.

Already in this light, therefore, as if in counterpoint to the arguments raised against AI in the judiciary, a constitutionally legitimate objective can already be found for the introduction of such solutions in practice, even when these are existing outdated systems with known deficits. The existence of a viable option for the adjudication of individuals’ cases in a situation where access to justice is at risk seems to be such a objective. If, on the other hand, the current capabilities of AI are taken into account, an algorithm is created that makes full use of these capabilities, then the assessment that a modern court can also be an artificial court becomes more and more realistic.⁸⁵² A fantasy ceases to be a myth and becomes reality.

The constitutional standards related to the right to a fair trial can be complemented in particular by an AI model that is transparent, understandable to the AI user, respects privacy, is rational, serious and verifiable, allows human control of its operation, avoids the risk of relying on inaccurate, outdated, erroneous data, thus preventing so-called ‘hallucinations’ of AI. The aim of such a model should be to manage and control the judicial system in a way that is not biased, but equal and fair, eliminates all possible forms of discrimination, meets the standards of good practice in the technological environment and is constantly monitored by a public body belonging to the judiciary, preferably a judicial council or equivalent body, so that it is subject to full judicial control without external interference. The aim of such a model should be to manage and process judicial proceedings, to facilitate and speed up access to justice. It is in these areas, as the comments so far have shown, that more or less emphasis is placed on assessing the proper functioning of AI systems in the judiciary. An algorithm that meets such standards will be able to claim the attributes necessary for an independent court, an independent

⁸⁵⁰ *European Court of Human Rights: 23 April 1987, Ettl and Others v. Austria*, App. No. 9273/81.

⁸⁵¹ *Trybunał Konstytucyjny: 24 October 2007, SK 7/06* (n 845).

⁸⁵² *Sousa and others* (n 413).

and impartial judge, thus meeting the modern requirements of right to a fair trial. It is in this direction that modern algorithmic solutions in the judiciary must be designed.

All AI systems, those that support decision-making processes or the ones that perform decision-making processes should be examined through algorithmic impact assessments that identify implications for access to justice and individual rights and potential risks. Such reports may inform whether the systems should be deployed and recommend the appropriate risk prevention, mitigation, redressal, and monitoring measures. The adoption of artificial intelligence systems should be based on respect for human rights,⁸⁵³ which will consequently enable the judiciary to respect, protect and promote human rights when administering justice. These systems should ensure accountability by informing and explaining why certain AI tools have been adopted by the judiciary and ensuring the traceability of the processes and results of the AI system, especially when such tools are used in decision-making processes. Administrative, legal and human measures are needed in this area to ensure that AI systems can be monitored during and after their implementation. Artificial intelligence systems must offer full transparency of training data and enable implementers and users to assess the quality and integrity of such data. In the implementation process it must be ensured that the developer or supplier of the AI system agrees to allow and cooperate with algorithmic audits carried out or commissioned by the organisation to external parties. Processes should be established for third parties or members of the judiciary to report potential vulnerabilities, risks or biases in the AI system. Human control and supervision, or at least monitoring, should occur during all the implementation stages and usage of the AI system.⁸⁵⁴

One can imagine the functioning of AI systems especially in certain categories of cases, where the action of the judge is repetitive. Once a specific algorithm has been constructed, it is in the selected areas that tests of the functioning of AI tools (pilot projects) could begin. In the current normative state, it is primarily first-instance proceedings that are at stake, and these tools, as one can imagine, would have to serve as tools to support the work of judges in the first place. Indeed, the legal systems of European countries lack a normative basis for judicial decision-making by AI. The observation of

⁸⁵³ Nemitz (n 178) 7 ff.

⁸⁵⁴ Razmetaeva, Barabash and Lukianov (n 56) 45 ff.

the test period (pilot projects) and its possible success could be an important impetus for the preparation of laws regulating the possibility of judicial decision-making by AI. Then there would already be a legal basis in current legislation entrusting AI with the competence to decide certain categories of cases, i.e. to entrust a judicial function to something (someone?)⁸⁵⁵ with a status similar to that of judges.

Such a law would, of course, have to provide not only for the categories of cases in which decisions will be made by artificial intelligence, but also for the shaping of the entire judicial procedure involved, from the filing of a legal remedy before a court, through its processing, decision-making or appeals, together, of course, with the possible participation of the parties in the various stages of such proceedings. To this end, a separate type of procedure would have to be designed, in which cases would be decided by artificial intelligence. It is conceivable that such a procedure could be an alternative procedure to the traditionally regulated procedure. There would thus be two paths to justice in a particular category of cases: artificial and traditional. A similar situation already exists in some small claims cases, where there are two alternative ways of pursuing claims (e.g. traditional and e-court-related, as in the case of claims based on EPU in Poland).

Another approach could also be imagined, involving amendments to individual constitutions in particular countries explicitly describing the role of artificial intelligence in the administration of justice. If the problem relates to the office of judge, which, according to the interpretation of the constitutional provisions expressed in the commonly accepted position, is reserved for humans, one could consider departing from the rule that the court must in any case be composed of human judges. The most appropriate in this regard would be, at least in the initial phase of AI implementation in the judiciary, which can be described as a test phase, to allow artificial intelligence to administer justice in lower courts, in typical, repetitive cases, including those in which artificial intelligence already has experience. Since in some countries these solutions sometimes operate outside the constitutional order, it seems necessary to constitutionalise them. Of course, the most tempting in this respect is judicial decision-making by artificial intelligence, which does not mean, however, that the mere support of judges by AI systems currently meets constitutional standards, as has already been mentioned.

⁸⁵⁵ Jacob Turner, *Robot Rules. Regulating Artificial Intelligence* (Palgrave Macmillan 2019) 173-205; Laura Miraut Martín, *La formulación jurídica del libre desarrollo de la personalidad*, (Dykinson 2023), *passim*.

For it should be recalled that the boundary between AI support and *de facto* decision-making (by AI) is difficult to grasp.⁸⁵⁶

There are therefore two independent possible paths forward in this area, the paths of implementation of AI models in the judiciary, the paths of testing applications of artificial intelligence in the administration of justice. Then, both paths, after the testing phase, should move towards the constitutionalisation of AI in the judiciary. The decision of the legislator on the possible application of AI in the judiciary could contribute to cut through some of the doubts related to the interpretation of the principles of the exercise of judicial authority, as defined, for example in Articles 45, 178-180 of the Polish Constitution, Article 24, Article 117, Article 120 of the Spanish Constitution or Article 92 of the German Basic Law. For this reason, after the successful testing period, in order for artificial intelligence to become firmly established in national legal orders, it seems necessary to find a proper place for it in the constitutions.

When considering the categories of cases to which such a modern approach could be applied, it seems that these should primarily be cases involving small claims (small civil cases).⁸⁵⁷ Proceedings such as the German *Mahnverfahren*, the Spanish *Proceso Monitorio* or the Polish EPU writ-of-payments proceedings are the type of proceedings where artificial intelligence could be used first. There are many reasons for this, including the number of cases in the dockets of individual courts of this type. These are mass proceedings. For example in Spain, according to available statistics, 1 063 672 such cases were filed in 2023, in Germany approximately 4.5 million cases filed in the same year, and in Poland over 2 million such cases.⁸⁵⁸ A common feature of these proceedings is that they are based on a special simplified enforcement procedure, the purpose of which is to grant the creditor an enforcement order if the defendant does not object to the claim. An order for payment is issued in the case, which results in further court proceedings only if the debtor objects to the claim presented. Technically, this seems adequate to test the use of artificial intelligence in the administration of justice. The provisions of Articles 812 to 818 of the *Ley de Enjuiciamiento Civil*, § 688-703d of the *Zivilprozessordnung*, or Articles 505[28]-505[39] of

⁸⁵⁶ Sierra Cadena (n 659) 14 ff.

⁸⁵⁷ The idea of small claims courts is not new, cf. Eric H Steele, 'The Historical Context of Small Claims Courts' (1981) 6 American Bar Foundation Research Journal 293.

⁸⁵⁸ These statistics are provided following the ChatGPT query, available online at: <<https://chatgpt.com/>> accessed 30 March 2025.

the *Kodeks postępowania cywilnego* seem ideally tailored to be extended in the way suggested. AI could be used to automate these proceedings given its straightforward and repetitive nature.

Another type of proceedings where the use of AI seems possible are small consumer cases, where there should be a fast and free method of enforcement of consumer protection rules. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on out-of-court settlement of consumer disputes sets out the scope of such cases.⁸⁵⁹ It implies how such cases should be resolved by ADR. Instead of ADR, AI could therefore be an alternative path, except that in the ordinary courts. As in the example of cases where an order for payment is issued, the role of AI seems desirable here, especially as the number of such cases is also steadily increasing.⁸⁶⁰

As far as other civil cases are concerned, it should be pointed out that there are also cases, the number of which is massive, in which the legal issues have already been decided at the level of supreme courts, and their current adjudication generally follows the rule of substitution to the existing paradigm. For example, cases concerning loans can be mentioned here. A large number of such cases occur, for example, in Poland, involving claims arising from agreements indexed or denominated to the Swiss franc.⁸⁶¹ It has to be recalled that lawyers debated the legal nature of loan agreements indexed and denominated to the Swiss franc for several years.⁸⁶² First the CJEU and finally also the Polish Supreme Court resolved the most important issues in this area.⁸⁶³ The abusiveness of contractual clauses was determined, the effect of which is in principle always the invalidity of the loan agreement *ex tunc* and the associated obligation of the bank to return everything it received from the borrower. In turn, there is an obligation on the part of the borrower to repay the capital. The question of the running of the statute of limitations and the lack of grounds for directing claims for remuneration for the use of the capital has been clarified. Further case law has also determined,

⁸⁵⁹ Heronim Ostrowski, 'Pozasądowe dochodzenie roszczeń z zakresu sprzedaży konsumenckiej' (2022) 2 International Law Quarterly 77.

⁸⁶⁰ Pablo Cortés and Arno R Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014) 21 Maastricht Journal of European and Comparative Law 14.

⁸⁶¹ Gagyí and Mikuš (n 419).

⁸⁶² Sosnowski Krabbe (n 420).

⁸⁶³ *Sąd Najwyższy: 25 April 2024, III CZP 25/22* (2024) OSNC 12.

among other things, the question of the right of retention. In principle, there are no longer significant problems that have not yet been resolved in the case law of the Supreme Court and the CJEU.⁸⁶⁴ Despite this situation, it takes several years to wait for the resolution of a single such case in Poland.⁸⁶⁵ It was in one such case that the date of the first hearing in Poland was set as late as 2030. Meanwhile, it seems that it is precisely this area, where things are very typical and decisions concerning them are basically formulaic, where algorithmic solutions could be applied.

There are also other categories of cases where it is possible to create such an alternative path to the traditional one. These include, for example, cases concerning the division of property, insurance benefits (especially when national tables are used to determine the amount of benefits to be paid), the acquisition of inheritance rights, or cases in which the court merely declares the validity or enforceability of judgments. Of the cases in the area of criminal liability, the most prominent are misdemeanour cases, especially those involving traffic violations (speeding, parking violations, or running a red light, where the facts are usually clear, and the applicable laws are straightforward). These cases are also relatively abundant, and their alternative resolution using artificial intelligence could have another important objective that could perhaps be realised. The universality of such cases could make the use of artificial intelligence more widespread, strengthening citizens' confidence in such solutions. Some other cases in the area of criminal court activity where algorithms could be applied are also, for example, those concerning the determination of the validity of judgments, or cases concerning the enforcement of judgments. The success of the first areas of application of AI (pilot projects) could allow for its further incorporation, including into more serious cases, where, with the development of AI, which will certainly be steadily progressing, it will be possible to extend the jurisdiction of AI in the administration of justice.

An alternative artificial judiciary, once properly tested, could claim its more sophisticated implementation in the justice systems of individual states. The right to resolve disputes within a reasonable time, without undue delay, an element of the right to a fair trial, would gain new possibilities and the

⁸⁶⁴ Łukasz Węgrzynowski, 'Prawo zatrzymania w sporze frankowym' (2024) 50 *Prawo i Więź* 475.

⁸⁶⁵ Krzysztof Koźmiński and Michał Jabłoński, 'Interwencja legislacyjna jako propozycja rozwiązania problemu tzw. kredytów frankowych: wybrane aspekty teoretyczne i praktyczne' (2022) 38 *Acta Iuris Stetinensis* 141.

justice system would gain a new face. The interpretation of the constitutional standards for the exercise of judicial authority, if that authority is to be efficient, must therefore view artificial intelligence as a tool that will ensure unprecedented brilliance to judicial proceedings.

5.6. *Summary*

Artificial intelligence can and should be part of a modern judiciary, including at the judicial decision-making level. The state of development of artificial intelligence and the existing constitutional standards on the right to a fair trial can be synchronised. It is necessary to construct an algorithm that will use the full potential of artificial intelligence, while at the same time meeting the requirements of transparency, comprehensibility for the AI user, respect for privacy, being rational, serious and verifiable, allowing its operation to be controlled by a human being, preventing the risk of relying on inaccurate, outdated, erroneous data, thus preventing the so-called ‘hallucinations’ of AI. It will also have to be non-biased, fair and equitable, eliminate all possible forms of discrimination, comply with the standards of good practice in the technological environment and be under the permanent supervision of a public judicial authority, preferably a judicial council or equivalent, so that it is under the full control of the judicial authority, without any possibility of external interference.

When this happens, the justice system will be ready to respond to the growing needs of society for more efficient judicial proceedings. Efficient judiciary is a desirable phenomenon for many.

Conclusions

The basic findings of this study boil down primarily to the identification that algorithmic reality in the judiciary has become a fact. Observing the problems of the justice system in many countries, as well as the development of artificial intelligence, it seems that there are sufficient grounds to defend the view that artificial intelligence is capable of improving the efficiency of the judiciary. Since, according to many, an efficient judiciary is an essential element of a democratic state governed by the rule of law, it appears, in the light of the research conducted, that it is already possible today for artificial intelligence, due to its capabilities, to become part of the judiciary in accordance with constitutional standards. The future of the judiciary is therefore artificial judiciary.

It should be noted that due to protracted judicial proceedings and, consequently, increasingly long delays in the administration of justice, the inefficiency of the justice system - for that is how this phenomenon should be described - is perceived as its greatest shortcoming. One of the fundamental consequences of the inefficiency of the justice system is the weakening of public trust in the justice system. The negative consequences of protracted judicial proceedings are considered obvious by many. Therefore, the efficiency of judicial proceedings is an important value, which must lead to the conclusion that optimal proceedings should be as short as possible. Of course, the matter is not as straightforward as it might seem at first glance, especially since there are a number of different guarantees that such proceedings must comply with (which does not always allow for a quick conclusion of proceedings), but efficiency seems to be one of those factors without which the administration of justice and justice itself cannot exist. A lack of trust in the justice system always leads to a serious crisis of state

authority and doubts about the meaning of judicial justice. Therefore, various measures are taken or recommended to increase the efficiency of judicial proceedings. These measures vary from country to country due to differences in the state and position of the judiciary, as well as differences in the level of public trust in the justice system. Nevertheless, they often have at least one thing in common: they are based on new technologies. It is new technologies that enable the automation of processes that have traditionally been carried out in an 'analogue' manner. One such new technology is undoubtedly artificial intelligence, whose importance, including in the field of judiciary, is constantly growing.

Examples of the use of artificial intelligence in the judiciary, already found in many countries around the world, are convincing arguments for its further use on a larger scale. Although a number of existing tools used in the judiciary and based on artificial intelligence algorithms do not meet the standards of independence appropriate for courts and the standards of impartiality and independence appropriate for judges, the practical benefits of using such systems are significant. Thanks to artificial intelligence, many tasks in the judiciary can be performed more efficiently and quickly than if they were performed by humans. This is not only about simple technical tasks specific to court registries, but also tasks related to the analysis of court files, the processing of relevant information contained therein, the proposal of appropriate legal classifications based on existing case law and doctrine, and even the proposal of specific decisions and judicial decision-making *ex machina*. Algorithmic mechanisms are evolving, becoming increasingly sophisticated, and, in principle, from the point of view of judicial competence, they are now complete. The problem, however, is their adaptation to traditional standards of judicial authority. It is nevertheless possible to create an algorithm that will meet these standards (of judicial authority). It is only a matter of time before this happens.

Artificial intelligence in judiciary is and will continue to be useful, and its future will depend primarily on the trust of the public, which it has not yet managed to gain on a larger scale. The current state of development of artificial intelligence tools allows human judges to be replaced by AI algorithms in many aspects of the administration of justice, including the most tempting area, i.e. judicial decision-making *ex machina*. Perhaps AI won't replace humans completely, but definitely humans with AI will replace humans without AI.

A comparison of multiple legal systems in terms of the standard of judicial authority, including a broader look at the law in Germany, Spain, and Poland, naturally leads to the conclusion that it is difficult to identify a single correct standard that the justice system of the future should meet, including one that would be algorithmic in nature. Comparative studies on judicial authority show that constitutional identity, tradition and, sometimes, the activity of national bodies responsible for constitutional matters do not always allow for uniform conclusions as to how the judiciary should be shaped in order to fulfil its constitutional duties. Nevertheless, against the background of specific solutions found in many countries, especially in European countries (which are the main basis for the research conducted in this study), certain minimum guarantees for the proper functioning of courts in the modern world can be identified, which boil down to the statement that everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, without undue delay. Against the background of Article 19(1) TEU, Article 47 CFR, and Article 6(1) ECHR, as well as against the background of individual constitutions, these guarantees are constantly evolving and will soon, it is to be expected, also cover artificial judiciary. Admittedly, there are currently no constitutional or international provisions that explicitly refer to these standards (in the context of the possible administration of justice by artificial intelligence), but this must mean that it is necessary to 'discover' the appropriate place for artificial judiciary primarily in the light of the wording of Article 19(1) TEU, Article 47 CFR, Article 6(1) of the ECHR and national constitutional provisions. These are the legal bases requiring national legal systems to move towards achieving an effect that meets contemporary requirements in the field of justice, and given the constant development of social relations, these legal bases will also have to evolve. This evolution should take place primarily by identifying the appropriate place for artificial intelligence. One such appropriate place is, among others, the adjudication of cases.

Previous attempts to evaluate existing AI models in the judiciary through the prism of standards of administration of justice reveal significant shortcomings in individual AI models. However, this does not mean that this reality is not changing, which essentially has two pillars. Firstly, artificial intelligence models are undergoing transformation, with their functionalities becoming increasingly sophisticated, often unattainable for humans. Secondly, the standard of independence applicable to courts and the standards of independence and impartiality applicable to judges are also undergoing

a kind of update to bring them into line with modern times. Undoubtedly, the traditional approach to these issues needs to be reinterpreted, considering social needs and the suitability of artificial intelligence to support the judiciary. These new perspectives cannot be ignored. From this point of view, artificial intelligence can meet these standards.

This must mean that the future of administration of justice includes artificial intelligence that meets the standard of an independent court established by law, which will issue impartial decisions. As research has shown, an algorithm can be designed in such a way that it is subject to judicial review without violating the right to a fair trial - today a fundamental civil guarantee of the proper functioning of the justice system - especially when designed in accordance with the so-called '*glass box*' approach, based on the greatest possible transparency of the AI development process, and its practical solutions are based on so-called explainable AI, i.e. a system that can be explained by humans. Such an AI model would be optimal from the point of view of resolving court cases, which already seems to be only a matter of time.

The study also established that, in accordance with Article 27 of the EU AI Act, and thus according to the world's first 'hard law' regulating the field of artificial intelligence, before implementing a high-risk artificial intelligence system (which AI in the justice system is), it is necessary to assess the impact of such a system on fundamental rights. Based on existing case law, legal scholarship and other legal instruments, in particular a number of 'soft law' documents, it has been proposed that such an assessment should be based on the following criteria, the significance of which was explained in detail: (1) transparency; (2) comprehensibility for the user of AI; (3) respect for privacy; rationality, seriousness and verifiability; (4) accessibility of human control; (5) ability to eliminate the risk of relying on inaccurate, outdated and erroneous data; (6) prevention of so-called AI hallucinations; (7) prevention of bias; (8) ability to pursue equality and fairness; (9) ability to eliminate all possible forms of discrimination; (10) relevance to standards of good practice in the technological environment; (11) ability to be subject to continuous monitoring by a public entity from the judicial sector; (12) assessment of the possibility of external interference. Such an algorithm, which can be developed in cooperation between legal and technological communities, should form the basis of the future artificial judiciary. An alternative, artificial justice system, after undergoing appropriate testing,

could then be considered for more complex implementation in the justice systems of individual countries.

Artificial judiciary is therefore no longer just a dream, but a future reality, albeit perhaps still somewhat distant. However, this reality is inevitably approaching, and in order to take advantage of this perspective, which seems entirely justified, it is necessary to attempt to resolve certain categories of cases in this way, after constructing an appropriate algorithm. The future of the judiciary may therefore be based on (ro)bot judges. Since well-functioning, efficient and fully independent justice systems are crucial for the application and enforcement of EU and national law and upholding the rule of law, measures are needed to achieve this. After all, the efficiency of justice systems is a necessary condition for the protection of rights, legal certainty and public confidence in the rule of law.

In the times surrounding today's model of administering justice, it is already possible to find a constitutionally justified objective for introducing artificial intelligence systems into judicial decision-making *ex machina*. The real possibility of effective adjudication of court cases is precisely such a constitutionally justified objective. As indicated in the book, this objective can be achieved in two ways, with human intervention having to be regarded as a key element in various possible configurations. The integration of AI models with constitutional standards can therefore take either an interpretative or a regulatory path.

In the first case, based on the concept of the absence of a constitutional prohibition on the existence of artificial courts, against the backdrop of advanced artificial intelligence systems, the standards of judicial authority can be reinterpreted to such an extent that already today, at least in some areas of legal disputes, autonomous algorithmic decisions are possible, and thus take advantage of the benefits of new technologies *de constitutione lata*. On the other hand, if one were to take the position that regulatory changes are necessary, it would be necessary to modify the standards of the administration of justice by clearly indicating in which part of judicial proceedings artificial intelligence can be treated on an equal level with a traditional judge, to answer the question of when (ro)bot judge can be treated similarly to a human judge, if at all. This is essentially a decision for the constitutional legislator, although an unambiguous choice of one position or the other depends primarily on the specific legal system and the certain case (specific AI model), and ultimately, despite the need for technological

neutrality of the law, it seems necessary to take regulatory measures and unambiguously decide on several issues raised in this paper. Moreover, the line between a human judge merely using artificial intelligence and AI acting independently is not at all clear.

However, justice at our fingertips seems so tempting that even some of the shortcomings of artificial intelligence cannot overshadow the potential benefits of its use in the administration of justice. The pursuit of effective justice is a major challenge for modern legislators, who should take advantage of the benefits of new technologies to achieve constitutionally legitimate objectives. Therefore, the future lies in artificial courts, where judicial decisions will be made *ex machina*.

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Beata Stępień Załucka is a legal practitioner and an academic with the status of a university professor specialising in the promotion and protection of human rights, constitutional law and LegalTech. She is currently Head of the *Department of Human Rights at the Faculty of Law and Administration of the University of Rzeszow* [Poland] and also practices as a lawyer (advocate). She also has experience of academic work in other

units, including long-term scientific internships in Poland and abroad (including University of Reggio Calabria [Italy], Universidad de la Laguna [Spain], Universidad de Las Palmas de Gran Canaria [Spain], University of Pitesti [Romania], Rutgers University [USA], Sulkhan-Saba Orbeliani University [Georgia]). She is a member of the Instituto Iberoamericano de Estudios Juridicos [Portugal], Medditeranea International Center for Human Rights Research [Italy] and EUROFUR European Research Group. The book is the result of collaboration within a research group '*Judicial decision making. Special consideration of the migratory phenomenon*' (LDJC; GIR 261) conducted at the Universidad de Las Palmas de Gran Canaria, led by Prof. Laura Miraut Martín.

The subject of the study is the use of artificial intelligence in the judiciary, with particular emphasis on judicial decision-making. The author considers the constitutional standards of judicial authority, referring, among other things, to AI's compliance with the requirements of the right to a fair trial. The study presents selected AI-based solutions found in judicial practice, attempting to set a standard for the use of algorithms in the judiciary, and considering the future of artificial courts.