

René Sève, General Presentation VII

PREDICTIVE JUSTICE

Sylvie Lebreton-Derrien, Introduction to a "Merely" Virtual Justice..... 3

Predictive justice is summarily defined here as the justice algorithms can predict and hence envisaged as a merely virtual justice, that is to say only likely, not acquired in its existence and whose updating is left to the creation, imagination and intuition of users who will turn the prediction either into "a" solution proposed or into "the" solution finally adopted. Predictive justice thus appears as an area of legal prospective for litigants, legal professionals and legal science. This introduction to a merely virtual justice studies, on the one hand, the risk, quite limited, of a supremacy of virtuality, were it to become prescriptive for professionals or dissuasive for litigants; on the other hand, it pictures a bright future of empowerment by virtuality, through a necessary technical understanding of the tools for a predictive justice and an essential ethical breathing of its actors.

Évelyne Serverin, From Legal Computing to Predictive Justice Services, The Long Road of Public Access to Dematerialized Court Decisions 23

In the French system, like in the other families of continental law, law is enacted by a power and its interpretation is placed under the control of supreme courts only. This vertical model was put to the test in the early sixties when legal informatics was introduced. The first decision databases were aimed at professionals, and based on a documentary principle (I). The decree of 7 August 2002 stated the principle of a *right of free public access to the essential data of the law*, based on the selection of sources (II). In 2007, the *principle of completeness* has been at the origin of a decision-making base of appeal judgments, but without disclosure to the public (III). Finally, the French law of 7 October 2016 introduced a *principle of free public access to the decisions of lower courts*, opening up a right of re-use that is seized by producers of predictive justice (IV) software, and involving a renewal of the theory of jurisprudence (conclusion).

Pascale Deumier, Predictive Justice and the Sources of Law: Substantive Case Law49

Predictive justice, considered here as a tool for quantifying the data of the decisions delivered by the trial judges, will directly allow revealing case law, thus making it a source of law. Therefore allowing it to be used by legal professionals well beyond its original predictive function: it is likely to help better legislate, better interpret and better think law - all uses conflicting with the practices of lawyers as well as with the limits of predictive justice tools. These uses are not insignificant and they indirectly tend to guide case law by its harmonization. If it is a predictive justice stating standards that is seeking this harmonization, it might fetter the sovereign discretion of the judges of the lower courts. On the other hand, predictive justice can help rationalize this same power by calling for appropriate motivation. Predictive justice is

then a source of arguments rather than a source of norms and calls for the development of reflections and training on argumentation around substantive issues.

Samuel Ferey, Economic Analysis of Law, Big Data and Predictive Justice67

The prospects opened up by big data and predictive justice have been widely commented by legal economists. The article looks back at how these economic and technological developments can be understood by showing how the possibility of having more precise information on future law renews the classic problems of legal economy. After a brief economic description of these technical innovations, we revisit the possible automation and individualization when applying the rules of law, in order to understand the implications in terms of the economic efficiency of law. Finally, we deal with the automation of judgments and the work of the judge by tackling this question with cognitive biases and biases of judgments, well known in law economics.

Éloïse Kambrun-Favennec, The Disclosure of Public Data: a Prerequisite for a Predictive Justice. An Overview of Open Data Policies83

The predictability of court decisions rests on legal Open Data and Big Data favored by the French law for a digital Republic of October 7, 2016. This movement to disclose court decisions is part of a broader movement for public open data. Carried out at an international level by intergovernmental and non-governmental organizations, it is implemented through more or less ambitious regional and national policies. Thus, Open Data is not established in the same way in every State around the world and significant disparities exist.

Jérôme Dupré, From the Law seized by AI to the Law seizing AI, Some Food for Thought 103

Artificial intelligence (AI) is a notion conducive to fantasy. In practice, it refers to a technology allowing machines to do things that humans call intelligent. The relationship artificial intelligence has with law is essentially two-fold. On the one hand we can, thanks to artificial intelligence, treat the law like a mathematical object, thus making it possible to quantify the judicial hazard. In this context, the machine does not monkey the reasoning of the judge but allows to better measure the possible outcomes and their probabilities, in the hope of favoring amicable solutions. On the other hand, artificial intelligence is an emerging field of law that lawyers must seize. Law is not helpless against the many challenges existing in this field, whether autonomous robotics or expert systems. Responsibility for things and responsibility for defective products are the two main avenues to explore. Judges will have to deal with these new topics in the coming years, filling some gaps in the law, which will evolve in turn.

- Paolo Giambiasi*, Perspectives Opened by the Public Availability of Court Decisions: what place and what regulation for a predictive justice? State of play and analysis based on some of the proposals of the report of the mission on the open data of court decisions 117

The opening to the public of court decisions provided for in articles 20 and 21 of the French law of 7 October 2016 for a digital Republic will favor the processing, by automated tools, of data contained in the decisions. This exploitation opens up new prospects for litigants and legal actors, in particular a better understanding of justice, an increased predictability of decisions rendered by the courts, or the creation of economic value. However, it involves the development of appropriate regulatory mechanisms, the construction of which constitutes a challenge for the public authorities in a context of extremely rapid evolution of technologies and internationalization of actors and flows.

- Élise Mouriesse*, Which Transparency for Predictive Justice Algorithms?..... 125

The contribution is based on the observation that there are currently few transparency requirements regarding predictive justice algorithms made available to judicial and administrative judges to help them adopt court decisions, despite various proposals made in that direction. This paper considers why such requirements should be imposed and how they could be realized. First by explaining why such requirements might be desirable, recalling the numerous risks inherent in algorithms, especially when making them available to judges for the purpose of predictive justice, and by demonstrating that applying transparency requirements could counterbalance these risks. Then it presents the potential concretization of these requirements, first by strengthening their potential legal bases. It then builds on the requirements of administrative transparency applicable to administrations that base individual decisions on algorithms to propose a modeling of transparency requirements applicable to judges with regard to the degree of use of algorithms in the adoption of court decisions, with due regard to the prerogatives of judges and the guarantees they enjoy.

- Éric Filiol*, Risks of Using so-called Predictive Algorithms in the Sensitive Field of Justice..... 147

The use of predictive techniques in the justice process, with the development of data analysis (machine learning, big data) techniques, is considered not only as a necessary evolution but also as a revolution that would optimize and rationalize the management of litigants. This article aims at explaining to what extent this evolution carries risks, what are the stakes, some of which important, and above all why it is illusory to expect something positive for judicial proceedings.

Céline Béguin-Faynel, Judicial Open Data and Personal Data: Pseudonymization and Risk of Re-identification 153

In the last fifty years, advances in computerization have made case law more accessible via legal databases, now competing with Internet law platforms. The loi pour une République numérique, French law for a digital Republic of October 7, 2016 provided for the generalization of the disclosure of decisions of trial judges as open data. However the obstacles are numerous: conceptual, technical, material. First, there has been a shift from the issue of how to anonymize jurisdictional decisions to how to pseudonymize them. Secondly, pseudonymization could hinder the judicial open data movement, because of the technical complexity necessary to achieve it. Moreover its implementation proves legally delicate. Legislative references to the protection of privacy must be combined with application of the law on personal data, according to which the risk of re-identification of litigants must be limited. Finally, it is difficult to materially place the cursor of pseudonymization. Which indications should be disguised: those relating to the parties, or more broadly to the persons mentioned and legal professionals involved?

Tristan Allard, Protection of Personal Data Designed to be Disclosed: Description of a Minimalist Attack on a Pseudonymized Dataset 183

Software assisting in decision-making, relying on artificial intelligence techniques is increasingly used in the field of justice. However these techniques often require access to large amounts of personal information to achieve quality learning. In France, the legal framework seems today favorable to the disclosure of judgments, provided that the privacy of the persons concerned is respected. Nevertheless, it is still technically difficult to protect personal data before disclosure. This article aims to describe a minimalist attack that was performed in 2014 on a dataset protected by performing a pseudonymization algorithm. The originality of this attack lies in its simplicity - it did not require access to an auxiliary dataset - and in its target - the pseudonymization algorithm. We present the family of pseudonymization algorithms, describe and analyze the attack, and conclude on the role pseudonymization is playing in the General Regulation on the Protection of Personal Data.

Édouard Rottier, Consequences of Predictive Justice on the Act of Judging 189

Predictive justice must be understood as a way to tell what can be judged on the basis of what has already been tried. It relies on the exploitation of developing databases of case law. Designed to inform people about the likely outcome of a dispute, it could have the primary effect of dissuading people from resorting to a judge to settle a dispute whose solution would appear predictable. It cannot be a substitute for the act of judging, which consists in rendering a decision substantiated in fact and in law on the basis of elements that have been debated contradictorily. It could, however, enrich legal proceedings and contribute to defining and clarifying the balance between predictability and unpredictability necessary for the exercise of justice.

Patricia Pomonti, Risks and Future of a Virtual Justice 195

Open data for court decisions might improve citizens' effective access to legal information. It is likely to open up new economic prospects, in terms of value creation, of improvement in the competitiveness of companies, even of attractiveness of the French legal system. However it represents also a fundamental stake for the judicial institution and the professions of justice: their culture and practices are likely to evolve, appreciably and quickly. One of the interests of this better predictability of decisions will be to promote the development of Alternative Dispute Resolution (ADR). But there are also risks for the judiciary institution; they are here mentioned.

Philippe Bordachar, Foreign Investment, Predictive Justice and International Arbitration 199

A first approach would bring together predictive justice and international investment law under the same banner, the latter tending to provide the foreign investor with a stable legal framework, when the country hosting the investment may have a potentially unpredictable behavior. However, transforming arbitration decisions into open data, in the broad sense, is a process far from complete because the confidentiality of the deliberations remains, which inevitably truncates the sample of data exploited by predictive justice tools. It is even more true because arbitration dealing with foreign investments is a complex litigation characterized by an immense multiplicity of facts and applicable rules of law, thus making infinitely variable combinations of data and, consequently, more unstable predictions. Yet, these observations will not exempt us from issuing some recommendations in the event that our own prediction on predictive justice and international arbitration dealing with foreign investments is, in the years to come, foiled.

Bernard Stirn, Preliminary Thoughts on the Administrative Judge and Predictive Law 217

Didier Cholet, Predictive Justice and Fundamentals of the Civil Lawsuit..... 223

Predictive justice, which consists of evaluating the probabilities of successful trials with a computer, is an important technological innovation. It could have effects on the fundamental principles of trials, including civil trials. The right to a judge and the principle of equality of arms protecting the rights of the parties may be affected. The principles of independence and impartiality of the judge could also be disrupted as well as the judge's tasks. It is therefore important to be vigilant and to regulate predictive justice activity.

Jean-Marie Brigant, The Increased Risks of a Predictive Criminal Justice..... 237

Fruit of the advent of statistics and artificial intelligence, predictive justice carries many economic, technological and even sociological promises. Far from being a threat, the use of algorithms could give the possibility of predicting future decisions in disputes similar to those analyzed. While most of the literature on the subject deals

with civil litigation, the subject deserves a study for criminal cases in the light of the principles governing criminal law and procedure.

Pierre-Luc Déziel, The Use of Personal Information in the Context of Predictive Justice: The Case of Actuarial Tools for Assessing the Risk of Re-offending 253

The purpose of this short text is to reflect, in a somewhat exploratory way, on the idea that some of the conceptual tools developed by law to protect privacy can provide perspectives about the responsible use of personal information by actuarial tools for assessing the risk of re-offending. We attempt to demonstrate that the principles of accuracy of the data used, of rectification and erasure of digital traces could contribute in an interesting way to develop the use of these tools.

Emmanuel Kestenare, Predictive Justice and Legal Protection: what Contribution to our Customer Relationship? 271

As part of their ongoing process of innovation, the Covéa Group's legal protection teams have experimented with new "predictive" tools to support their advice in the litigations they manage. Among the objectives, one is to measure how these tools contribute to the perception by our policyholders of their chances of success and risks of conviction, in order to facilitate their decision on the follow-up of their file, and of course, to prepare new services for them.

Béatrice Brugués-Reix & Ashley Pacquetet, Predictive Justice: a "Tool" for Legal Professionals 279

Open data of court decisions has opened the market for predictive justice algorithms and many innovations combine artificial intelligence and the world of law. Predictive justice is a technological tool at the service of the lawyer but can it remain only a relevant accessory? Does it replace human work? What is the return for law professionals? Give what advice to properly integrate change into practice?

Louis Larret-Chabine, Isometric Law: a New Legal Paradigm Born out of Predictive Justice 287

A big bang. This creative explosion is what artificial intelligence represents for the world of law. An explosion first because the advent of the science of judicial data - created by the joint appearance of incredibly massive volumes of data and of the technologies needed to treat them - is shattering the hierarchy of jurisdictions and the way to understand law. A creative force also because the evolutions of the coming decades will put an end to the *summa divisio* between legal systems of civil and of common law to make them converge towards a new paradigm, the isometric law.

Magali Bouteille-Brigant, For a "Transjurialism"? 297

Artificial intelligence invades the law as it sweeps across all sectors of activity. If it reveals a real potential to improve and go beyond the limits of current law, it is accompanied by a risk of destabilization of our law. In order to take advantage of this

potential, it will be necessary to rethink the formation of the law, to establish a genuine ethics specific to artificial intelligence applied to the law, and to develop the ethical obligations of the magistrates.

Valérie Lasserre, Predictive Justice and Transhumanism 311

Predictive justice seduces because it promises a safer and better justice. Yet its very name, use, symbols, legitimacy and effects deserve to be criticized and discussed.

LAW AND ETHICS

Marie-Aimée Peyron, Law, Ethics and Justice 323

Three components govern our life in society and are likely to change the rule of law and the functioning of justice: law, morality and ethics. Is there a hierarchy between these three standards? What are the interferences between these constants that constitute the pillars of democracy, as well as of the rule of law and of justice? Therefore, there is the question of legality in the face of morals and ethics. Can an act be legal and unethical, morally wrong? Can an act be regarded as illegal when it might be seen as ethical, moral? Beyond this philosophical and societal reflection, it is legitimate to question judicial truth, its content and its possible contradictions ... It is also essential to remember that the ethics of lawyers is inscribed in a regulatory framework while drawing its purpose from ethics. We conclude that Law and Justice must take into consideration the ethical requirement. There can be no clash between law and ethics, since although they are independent, these two standards complement each other and allow society to evolve in a harmonized framework.

Éliette Abécassis, Law and Ethics 327

Today, the human being is in danger not only on the ethical level but also on that of its survival as such, since we are changing not only the course of civilization but also the vision of man, after the technological revolution. Only law and right can intervene in this unprecedented mutation, and it is up to the law to rule on the future of humanity and to decide for man what will become of him.

Dominique de la Garanderie, Law, Person and Professional Ethics 333

Ethics is prior to law, it inspires, prolongs, but also retains its autonomy. Rule of Law and Democracy impose respect and trust in law and justice in which legal professionals participate. These status professions respect a professional ethic. Thus, the common imperatives of the magistrates and lawyers make it possible to understand the meaning of the deontological rules that are independence, the notion of conflict of interests, the impartiality, the integrity, the secrecy, the probity, the respect of others, the dignity, conscience ... In spite of the specificity of each profession, Ethics remains the compass of professional behavior in the interest of the Law and the Person in order to guarantee the liberties and the confidence that it must have in the institutions.

<i>René Sève, Deontology and State Civil Service</i>	347
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The author does an historical reminder of the relationship between deontology and casuistry, as applied ethics. He shows, economically, that deontology is a closed collective goods, called club's goods, whose specificity he scrutinizes in the public sphere. He concludes that professional ethics is essential despite its conservative or cautious nature.

<i>Frédérique Dreifuss-Netter, Does the Judge Guarantee the Respect of Ethical Principles Relating to the Human Being?</i>	355
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<i>Marie-Anne Frison-Roche, To Protect Human Beings, the Ethical Imperative of the Legal Concept of Person</i>	363
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It is through the law that the human being has acquired a unity in the West (I). What religion had been able to do so did the Law by tagging each human being with the notion of "person" which cannot be separated from him (I.A). But this is what is challenged today, not the personality and the power that the human being has to express his freedom but the unity that it implies in the disposition that we have of ourselves in repelling the desire that others have always had to dispose of us. Current law tends to "pulverize" human beings into data and to transform into neutral legal services what was considered before as the devouring of others. The legal concept of "consent", ceasing to be the proof of a free will but becoming an autonomous concept, would suffice (I.B.).

To ensure that the "law of desires" does not prevail, which merely reflects the adjustment of forces, we must demand here and now the ethical sovereignty of Law, because Law cannot be a mere technique to adjust interests (II). We must request this if we do not want to live in an a-moral universe (II.A), if we realize that the unity of the person is the legal invention that protects the weak human being (II.B.). If we admit this imperative, then we must finally ask who in the legal system will express and impose it, namely the Legislator or the Judge, because we seem to have lost the ability to recall this principle of the Person on which the West was so centered. But the principles that are no longer said disappear. There would then remain only the case-by-case adjustment of interests between human beings in the world of particular forces. At this yardstick, Law would be no more than a technique of securing particular adjustments. Law would be reduced at that and would have lost its link with Ethics. (II.C).

READING NOTE

Gunther Teubner, <i>Fragments constitutionnels. Le constitutionnalisme sociétal à l'ère de la globalisation</i> , by Hugues Rabault	381
English Summary	391