

## ONLINE DISPUTE RESOLUTION FOR SMALL CLAIMS: IS THIS THE ONLY REALISTIC SOLUTION?

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**ABSTRACT:** Some jurists believe that the judicial process is not adequate for these lawsuits when they are transnational, but in fact, neither is it when they are national. It is true that a transnational claim is challenging in terms of applicable law, the search for national lawyers, the search of evidence and even the translations. But actually all inconveniences are based upon a very old mentality linked with the also very old 'de minimis non curat praetor'. Whoever thinks that dealing with transnational small claims is not really feasible, does not see how to deal with them adequately in domestic law either. These authors also think that the resolution of small claims should be transferred to mediation —often useless—, to consumer arbitration, whose institutional development as parallel to state justice is extremely complicated, or even to collective redress, although in the vast majority of cases there is not really a group of stakeholders that can be managed together. Furthermore, organizing this kind of collective redress is very difficult. It's maybe necessary to remember that class-actions in the US almost never reach the trial phase.

**KEYWORDS:** Artificial Intelligence, collective redress, consumer, mediation.

**SUMMARY:** 1. Introduction; 2. The everlasting problem of small claims; 3. The nuanced failure of arbitration; 4. The failure of mediation; 5. The failure of collective redress; 6. Artificial intelligence and predictive justice.

### 1. INTRODUCTION

It would be easy to say that in times of pandemic, judicial processes are only possible online. However, the pandemic will end up some day and a very

old problem will still remain among us: which is the more suitable judicial process to deal with small claims?<sup>1</sup>

Various solutions have been proposed to deal with these disputes. Nevertheless, no one seems to be willing to offer a good solution, despite the deep sense of injustice that the parties of the conflict often feel after these disputes, also if they were finally somehow “solved”<sup>2</sup>. Throughout history we have seen summary and special proceedings for small claims, special courts, lay judges, or professional but rookie judges<sup>3</sup>, and also a resort to A.D.R. All these possible solutions have been tried repeatedly, and although not in all cases it is possible to speak of a failure, the problem remains unsolved.

In this paper I will briefly review this whole little story of misadventures, which will conclude with a look into the future that is probably, finally, the definitive key that we have been searching for centuries to solve the small claims. In this matter, as in so many others, it is possible that technology represents a definite leap forward.

## 2. THE EVERLASTING PROBLEM OF SMALL CLAIMS

*De minimis non curat praetor*<sup>4</sup> is probably one of the most sincere phrases in the history of law. Certainly, the problem with small claims is not their complexity, which is often low. The drawback is their large number, since they really affect all citizens, as well as the resistance of the public powers to manage these disputes for two main reasons.

The first is the idea that the social conflict they produce is low, since they are not serious confrontations that could put the community or the powerful on the warpath. And certainly it is so. This sort of conflicts, even leaving them unresolved, do not usually cause greater evils, especially of public order.

The second reason is somewhat cruel. Resolving these disputes would require a judicial structure much more ambitious than the one we currently have, and much more than the one that has historically existed. Governments tend to find a multitude of places in which to invest money that are politically more profitable than Justice<sup>5</sup>. In the past it was wars, large commercial

<sup>1</sup> See HAU, Wolfgang, „Zivilprozesse mit geringem Streitwert: Small claims courts, small claims tracks, small claims procedures”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, n. 81, 2017, vol. 3, p. 570.

<sup>2</sup> See MOLINER, B. y FUENTES, M. (2011): “Causas y consecuencias de la insatisfacción en consumidores con atribuciones externas”, *Cuadernos de Gestión*, Vol. 11, n. 1, p. 37.

<sup>3</sup> Again HAU, Wolfgang, „Zivilprozesse mit geringem Streitwert: Small claims courts, small claims tracks, small claims procedures”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, n. 81, 2017, vol. 3, p. 570.

<sup>4</sup> The oldest reference of this phrase might be found in DE BENINTENDI, Pietro, *Decisiones causarum bononiensis*, Frankfurt. 1573, p. 6. Nevertheless, the phrase is probably still older. See KLINGENBERG, Georg, “Minima non curat praetor”, en: *FS Rolf Knütel* (2009), p. 559.

<sup>5</sup> CEPEJ, 8th report «European judicial systems - CEPEJ Evaluation Report - 2020, (2018 data). [https://www.coe.int/en/web/cepej/home/-/asset\\_publisher/CO8SnxIjXPeD/content/the-cepej-report-con](https://www.coe.int/en/web/cepej/home/-/asset_publisher/CO8SnxIjXPeD/content/the-cepej-report-con)

companies or the construction of palaces of all kinds. Now, without ruling out all of the above, there are a multitude of issues that attract the vote of the citizenry, but none of them usually have anything to do with the proper maintenance of a court structure.

Ultimately, nothing is done except to put patches, although legislators have not lacked imagination. Imagination, however, must be assumed, of very low intensity, really inferior to the Roman one. In the *Corpus Juris Civilis* any reader will be surprised to find out that the lawsuits that settle those old laws are almost always small lawsuits typical of a rural economy or little commerce<sup>6</sup>, above all. In fact, if Rome demonstrated something throughout its entire trajectory, it is its concern for the proper resolution of disputes, precisely those small disputes, even as a priority to the issues that we now include under criminal law.

And this was because they probably realized that these small litigation do cause a problem of public order, because they are usually at the origin, sometimes remote, of greater evils. In a historical moment like that of the Roman expansion in which, precisely, it was a question of abolishing self-defence as a way of establishing the authority of Rome, the worst thing would have been leaving open the daily conflicts of the population, as in this way the inhabitants, not seeing them resolved, will privately seek their particular way of resolving conflicts, failing to establish the aforementioned authority.

That could be, among other reasons<sup>7</sup>, the ground why Rome created the formulary system, seeking the indicated political end<sup>8</sup>. This process might have been aimed to be a conflict resolution mechanism in order to attract the newly conquered local population to Roman authority. For this reason, they might have arranged a process with two phases, the first —*in iure*— before a praetor; that is to say, a Roman authority, who would hear the conflict and would say what Roman law provides. The second, before lay judges —frequently constituted in jury<sup>9</sup>— who were neighbours of the place, so that the last word was theirs, and not of the Roman authority.

The praetor, at that time, was not in a courthouse, but in the *forum*<sup>10</sup>, in the central square of the town, where people walked and traded. The *praetori* performed as one more merchant. It is possible that this mechanism imposed the *pax romana* to a greater extent than any army. And we must not lose sight of the fact that the romans were dealing with what for centuries afterwards

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<sup>6</sup> See KASER, M. / HACKL, K., *Das römische Zivilprozessrecht*, München, 1996, pp. 156, 408.

<sup>7</sup> KUNKEL, Wolfgang / SCHERMAIER, Martin, *Römische Rechtsgeschichte*, Köln, Weimar, Wien, 2001, p. 112. KASER, M. / HACKL, K., *Das römische Zivilprozessrecht*, München, 1996, p. 156.

<sup>8</sup> See NIEVA-FENOLL, J., “El primer escrito judicial de Hispania: reflexiones de Derecho Procesal sobre el bronce II de Botorríta o Tabula Contrebiensis”, in *Jurisdicción y proceso*, Madrid, 2009, p. 147.

<sup>9</sup> KASER / HACKL, *Das römische Zivilprozessrecht*, p. 192.

<sup>10</sup> HÖCKER, Ch., “Forum” *Der Neue Pauly*, vol. 4, Stuttgart, 1998.

the authorities have refused to resolve again as Rome did: precisely the small claims.

In other words, what we are currently experiencing is the result of a progressive elitization of the legal profession, which probably produced a gradual distancing from the current people, focusing only on the lawsuits of those who could pay them. In fact, the all-free-justice which exists in various places, is not only very recent, but also does not even exist in most countries<sup>11</sup>. Therefore, what one day probably did not cost too much money—the work of a praetor and some lawyers— progressively became unattainable for the majority, and even for the State when it came to providing what was necessary to sustain the system.

As a result, it is very likely that the real problem is only the elitization of the access to Justice, a problem that has not been completely overcome since the French *Constitution* of 1791 tried to confront it<sup>12</sup>. What's more, as has already been said, different solutions have been tested, but they actually have been nothing more than patches, observing the result as a whole.

Canon Law tried to somehow control this elitization process with the summary procedure of the Decree of Clement V *Saepe Contingit* in 1306<sup>13</sup>, by the way, the first Pope of Avignon. In this way, the trend of trying to configure special, simpler procedures to solve small claims was inaugurated. However, this trend generated a multiplication of special procedures over the centuries, many of which still exist in our laws, the trend reaching even to the very European legislation with the European Small Claims Procedure<sup>14</sup>.

Other legislators, without renouncing the above, decided to have special judges for small cases. Thus arose the justices of the peace in 12th century England<sup>15</sup>, whose long history continues to this day, and which inspired the *justice de paix* of the French Revolution and other homonymous jurisdictions, particularly in Spain and Italy. In any case, these jurisdictions are related to other European courts also dedicated to small cases, such as the *Amtsgerichte* in Germany or the small claims courts in the USA since the mid-1950s of the 20th century, which came to replace precisely the justices of the peace, or the *Justice de proximité* in France, of short-lived duration, since created by the

<sup>11</sup> See *Gerichtskostengesetz* in Germany or the loi 30-12-1977 in France as examples of both trends.

<sup>12</sup> Chap. V, art. 2. – La justice sera rendue gratuitement par des juges élus à temps par le peuple, et institués par des lettres-patentes du roi qui ne pourra les refuser. – Ils ne pourront être, ni destitués que pour forfaiture dûment jugée, ni suspendus que pour une accusation admise. – L'Accusateur public sera nommé par le Peuple.

<sup>13</sup> See GUTIÉRREZ BERLINCHES, Á., "Algunas reflexiones sobre el concepto de sumariedad", *RDProc*, 2003, n. 1-3, p. 296.

<sup>14</sup> Regulation (EC) N. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

<sup>15</sup> BEARD, Ch. A. *The Office of Justice of the Peace in England in Its Origin and Development*, 1904. PICARDI, Nicola, "Il giudice di pace in Italia. Alla ricerca di un modello", *Riv. Dir. Proc. Civ.*, 1993, 3, p. 661. PRONIER, Dominique, *Le juge d'Instance dans la société française*, Paris, 1993, p. 36.

Law of September 9, 2002, it was abolished on July 1, 2017. Another example of the incredible accumulation of failed solution attempts on this topic<sup>16</sup>.

There are, of course, many other examples that reveal that concern for small claims has never ceased to be present in consciences<sup>17</sup>, despite not having received due political attention. But perhaps the most prominent is a synthesis of all the above: the UK tracks<sup>18</sup>, that is, that combination of special judges and procedural specialties, at the discretion of the litigant or judge, depending on the case. It is another attempt, one more in history, to try to solve this problem, although neither its success is remarkable nor does it seem to have been an inspiring model outside the United Kingdom, beyond the references, always somewhat diffuse, to case management<sup>19</sup>.

### 3. THE NUANCED FAILURE OF ARBITRATION

Another alternative to deal with small claims can be found in the repeated attempts to implement arbitration in our society, attempts that in general have again ended in failure. To quote just one example, the Spanish one, from 1953 until today there have been three arbitration laws: the Law of December 22, 1953, Law 36/1988 of December 5 and the current Law 60/2003 of December 23. It goes without saying that none of the three have served to solve, at all, the problem of small claims.

Arbitration, in reality, was a victim of the same problem that has already been explained regarding professional justice: elitization. Starting from good will intentions, always bucolic and even, let's say it, flower-power, to seek alternatives to state justice to try to combat its delays and costs, everything ends up generating a mechanism that, in reality, costs even more money<sup>20</sup>.

Arbitration doesn't work because is not very realistic to think that two opposing litigants are going to find a trusted third party to resolve the dispute. On the contrary, what these two litigants seek is someone with moral and intellectual authority who finds for whoever is right, but this is hard for a friend of both to do. Even in larger lawsuits, an arbitration association is usually resorted to in search of that impartial third party. And that is the central

<sup>16</sup> See. NIEVA-FENOLL, J., "La justicia de proximidad", in *Jurisdicción y proceso*, Madrid, 2009, p. 111.

<sup>17</sup> *Vid.* sobre el tema CAPPELLETTI, Mauro / GARTH, Bryant, "Access to Justice: The Worldwide Movement to Make Rights Effective – A General Report", en *Access to Justice*, vol. I/1: A World Survey, (1978) 3, pp. 69 y ss; *Access to Justice*, vol. II/2: Promising Institutions, dirs. Mauro CAPPELLETTI / John WEISNER (1979) pp. 489 y ss.

<sup>18</sup> SORABJI, J., "Austerity's Effect on English Civil Justice", *ELR*, 2015, p. 159.

<sup>19</sup> NYLUND, Anna, "Preparatory Proceedings in Norway: Efficiency by Flexibility and Case Management", in Ervo / Nylund (eds.), *Current Trends in Preparatory Proceedings*, 2018, p. 57. CABRAL, A. "New trends and perspectives on case management: Proposals on contract procedure and case assignment management", 2019, *Peking University Law Journal*, p. 6.

<sup>20</sup> See the main data about the different arbitration associations in NIEVA-FENOLL, J., "Mediation and Arbitration: A Disappointing Hope", 6 *IJPL*, 2016, p. 350.

problem: independence and impartiality. So easy to visualize —more than to define— and so difficult to obtain. Moreover, in these arbitration institutions, some even prestigious, there have been various not infrequent cases of lack of those characteristics that must always be present in judges<sup>21</sup>.

It is for this reason that perhaps other attempts in this area that specifically focus precisely on small claims can be fruitful. It is worth mentioning the experience of consumer arbitration boards in Spain, whose regulation and procedure is in another rule —the fourth— of arbitration: Royal Decree 231/2008, of February 15, which regulates the Arbitration System of Consumers, and that in fact it was published to adapt the system to the 2003 Law.

This norm establishes a very simple arbitration procedure before the arbitrators appointed by the arbitration board, which are public law bodies that are created within the framework of the state, regional or local administration. This way consumer disputes, that is, small claims, can be finally solved. To do this, consumers are helped to make their claim and everything possible is done to resolve it, usually in equity, a decision that must be made by the parties to the conflict.

This mechanism does seem to be working better<sup>22</sup>, although the reason is that it deals with very few claims. In order to attend the arbitration board, the trader must have adhered to the consumer arbitration system. The membership is voluntary, and few traders or corporations attend it. In reality, it is much more convenient for them to try to block consumers by resorting to the delays and costs of traditional justice.

For this reason, voices are rising more and more in favour of the mandatory nature of consumer arbitration, which has even reached a Justice of the Constitutional Court who has written a dissenting vote in this regard<sup>23</sup>. But for now that adhesion remains voluntary because the Constitutional Court has stated that a mandatory character would violate the right of defence, of course that of the trader. Apparently, for the Constitutional Court, it is not a denial of justice the fact that the consumer has at his disposal a mechanism that he cannot afford in terms of money and time: the judicial process.

#### 4. THE FAILURE OF MEDIATION

Another means that has not usually worked is mediation. Despite the strenuous attempts of the European Union to promote it (Directive 2008/52 / EC

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<sup>21</sup> See FACH GÓMEZ, Katia, “La creación y el funcionamiento de los tribunales comerciales internacionales: estudio de sus efectos en el ámbito del arbitraje comercial internacional”, (18 de septiembre de 2018), en A. M. López Rodríguez and K. Fach Gómez (eds.) *Reconocimiento Y Ejecución De Sentencias Arbitrales Extranjeras en España Y Latinoamérica*, Valencia, 2019. See also [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3255670](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255670), and PARK, W.W., “Procedural Tension in International Arbitration: Arbitration in Autumn”, *International Arbitration*, 2013, p. 3.

<sup>22</sup> See <https://juntarbitral.bcn.cat/>

<sup>23</sup> See STC 1/2018.

of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters), mediation is present currently in only 1% of EU disputes<sup>24</sup>.

And no wonder. First of all, neither the doctrine nor the European Union should have been unaware that for a long time an identical—rather than analogous—mechanism was tried in several European countries: conciliation. And it failed because when the parties are already at odds, they do not have the slightest intention of conciliating, unless someone with a certain authority urges them to do so. And if that someone, who was normally a judge—as it happens with mediation in Germany (§278.5 ZPO)—goes overboard, the alleged conciliation ceases to be a peaceful method of conflict resolution to become a threat.

It is not possible to foresee a different future for mediation, also taking into account the naive doctrinal claims that the mediator only “dynamize” the conflict, but does not propose any solution<sup>25</sup>, which the parties should find on their own. How is it possible that parties find common solutions if they are maintaining the dispute precisely because they have not found them? If at least the mediator could make a proposal with a certain *auctoritas* being a well-learned jurist... But mediators, in theory, cannot make proposals, or tell the parties how the judgment in a case could be. Nevertheless, such proposals could certainly weaken the intransigence of the parties...<sup>26</sup>

But there is also another problem. Lowering the emotions of two opposing parties takes time. A time that a consumer, for instance, does not have. The consumer wants the trader to comply at once, and not to acquire any advantage because he behaves like a fair person and gives in. This way one of the worst problems of mediation is observed: too many times someone who does not deserve anything gets something, and simply because he refused to fulfil his obligation. In consumer litigation, precisely, that is a constant.

Therefore, it does not seem that insisting on mediation will lead anywhere. Mediation is a space in which the powerful have everything in their favour to abuse the vulnerable. It may be a suitable instrument in conflicts that are only emotional, but where there is no real discrepancy, as fake discrepancy is simply used to keep emotions alive. This is also the case frequently in conflicts of international law<sup>27</sup>. But in the rest of the litigation, particularly in

<sup>24</sup> ZATO ETCHEVERRÍA, María, “Una aproximación al mapa de la mediación en la Unión Europea”, *Revista de Mediación*, vol. 8, n. 1, 2015, pp. 72 y ss.

<sup>25</sup> PUNZI, Carmine, “Mediazione e conciliazione”, *Rivista di diritto processuale*, vol. 64, n. 4, 2009, p. 848. See also MARQUES CEBOLA, C., *La mediación*, Madrid, 2013.

<sup>26</sup> About these and other problems of mediation, specially the biased statistics of its success, see some relevant assertions in NIEVA-FENOLL, J., “Mediation and Arbitration: A Disappointing Hope”, *International Journal of Procedural Law*, vol. 6, 2016, p. 358.

<sup>27</sup> TAMARIT SUMALLA, J., “Justicia penal, justicia reparadora y comisiones de la verdad”, in Tamarit Sumalla (ed.), *Justicia de transición, justicia penal internacional y justicia universal*, Barcelona, 2010, p. 45. MARTIN, A., *La mémoire et le pardon. Les commissions de la vérité et de la réconciliation en Amérique Latine*, Paris, 2009.

civil conflicts, that emotional charge is mostly non-existent. Being aware of this, perhaps it is time to put efforts in mediation on hold.

## 5. THE FAILURE OF COLLECTIVE REDRESS

I am very much afraid to say that collective redress will end up following a very similar path. It is already a reality in European legislation through Directive (EU) 2020/1828 of the European Parliament and of the Council of November 25, 2020 on representative actions for the protection of the collective interests of consumers.

This directive is inspired, as it is well known, in the US class actions. And as has happened with practically all the studies dedicated to this subject, it has been ignored that class actions PROCESSES practically never reach the trial phase<sup>28</sup>. Parties, being faced with the terror of the expenses caused by the judicial process in a society that in recent years has been increasingly neoliberal, reach any agreement rather than risk going through a process before a jury, whose results are obviously unpredictable, given the lay character of its members, but who may have a tendency to rule in favour of the consumer by being consumers themselves. It is unspeakable that this lack of impartiality of the “judge” ends up causing as a positive effect on consumers, being the right to consumer protection practically absent in the US<sup>29</sup>. That is precisely, and not by chance, one of the main flags of the European Union, which of course should be maintained.

If the collective process reaches the trial phase, the process becomes a nightmare. It is not easy to bring together the entire group of the stakeholders, but it is even more difficult to put everyone in agreement so that they have only one lawyer, or at least a few, because otherwise it will be impossible to carry out the process.

Likewise, it is often impossible to collect all the evidence. Lawyers must be in charge of this work, and even with relatively small groups, this work is usually very complex, and must take a long time since those affected tend to have contrasting documentation that can harm the evidence strategy.

Finally, the complexity is reproduced not only in remedies, for the same reason of the disparity of opinions of the plurality of litigants, but also when deciding who is affected by the judgment. The most original doctrinal<sup>30</sup> ela-

<sup>28</sup> See ORMAZABAL SÁNCHEZ, Guillermo, “El “dieselgate” ante los tribunales alemanes y norteamericanos: lecciones que cabe extraer respecto del tratamiento de la litigación masiva”, *InDret* 3, 2020, p. 25.

<sup>29</sup> See anyway the Bureau of Consumer Protection in <https://www.ftc.gov/es/about-ftc/bureaus-offices/bureau-consumer-protection>, and specially the mentality involved: “Competition in America is about price, selection, and service. It benefits consumers by keeping prices low and the quality and choice of goods and services high.” See <https://www.ftc.gov/about-ftc/what-we-do>

<sup>30</sup> VIGORITTI, V., *Interessi collettivi e Processo. La legittimazione ad agire*, Milano, 1979. PELLEGRINI GRINOVER, A., “La tutela giurisdizionale degli interessi diffusi nel sistema brasiliano”, *Riv.*

borations on the matter have appeared with conclusions that can lead to an unacceptable legal uncertainty for the company by questioning *res judicata*. Another difficult topic arises regarding the enforcement. Its results can be very uncertain if the judgment has not clearly delimited the stakeholders, as it usually happens.

In order to summarize, collective redress has usually been presented as one of the main developments that occurred as a consequence of the social and economic changes of the 20th century<sup>31</sup>. Nevertheless, collective redress is much older than is believed and it is not a good solution in systems such as civil law ones, where processes usually reach the trial phase. It is different in places like the US where everything possible is done to deter or even chill litigants from keeping the process alive. And in fact, class actions are a deterrent mechanism for traders.

## 6. ARTIFICIAL INTELLIGENCE AND PREDICTIVE JUSTICE

So what to do? Maybe nowadays online resolution offers an adequate answer to this problem, with the help of Artificial Intelligence. It is true that not so often a “group of stakeholders”, in terms of small claims, is to be found, even if they are consumers. Nevertheless, it is also true that small claims are usually analogous in many cases, and can be classified by large groups that, in reality, when they are analysed by a court, they are always resolved in the same way, and almost always looking for the same evidence. The defence of the parties in the vast majority of these cases is predictable.

Therefore, the most important challenge is to identify these groups of small claims, as well as the more frequent grounds of defence of plaintiffs and defendants. The cases are so highly analogous that an algorithm can be—even easily—designed. The algorithm would allow these disputes to be resolved at a European level without translations or applicable law difficulties, provided that the small claim refers to matters that have been subject to European regulation. If this is not the case, maybe the substantive law applicable in the different countries is very similar. Thus, judgments could be issued very shortly with the assistance of Artificial Intelligence and the supervision of a judge. All with very little expenses, no need for travelling at all or other complications. This would lead companies and consumers to adapt their behaviour to the fact that they no longer have a slow justice as an ally.

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*Trim. Dir. Proc. Civ.*, 1984, p. 66. BARBOSA MOREIRA, J. C., “La iniciativa en la defensa judicial de los intereses difusos y colectivos (un aspecto de la experiencia brasileña)”, *RDProc.*, 1992, n. 3, p. 527. PROTO PISANI, “Appunti preliminari per uno studio sulla tutela giurisdizionale degli interessi collettivi (o più esattamente: superindividuali) innanzi al giudice civile ordinario”, en: “AAVV, *Le azioni a tutela di interessi collettivi, Atti del Convegno di studio, Pavia 11-12 de junio de 1974*, Padova, 1976, p. 815. COSTANTINO Giorgio, *ibidem*, p. 817.

<sup>31</sup> CAPPELLETTI, Mauro, “Formazione sociali e interessi di gruppo davanti alla giustizia civile”, *Riv. Dir. Proc.*, 1975, p. 361.

Artificial intelligence is a tool that has infiltrated a good part of our daily lives. It is so integrated into our normality and makes things so comfortable for us, that we do not realize that it is not only social networks or internet search engines that make use of it, but also the traffic lights on the streets, the lights of a building or some surveillance systems whose effectiveness we enjoy but do not perceive because we do not even know they exist.

Leaving aside the Chinese experience for being undemocratic by pretending, with elegant and attractive subterfuges, to make of the adjudication an automaton manifestation<sup>32</sup>, in matters of justice<sup>33</sup> some applications have already been developed that help to manage the day-to-day running of a court by classifying matters and anticipating their processing. Some other applications automate claims of monetary debts, or try to process the most frequent complaints in a much faster way<sup>34</sup>, although not always efficient. They have even gone so far as to assist judges in planning the search of evidence and assessing it<sup>35</sup>, or in the evaluation of the risk of criminal recidivism in the interim measures in the criminal process<sup>36</sup>.

Not all these means work correctly, and on many occasions they generate great controversy, not so much because of the fearsome—and somewhat unreal—assumption that machines are going to replace the judges, but because the use of such tools has led to the settlement of rejectable biases in judges' decisions, such as racism<sup>37</sup> or other marginalization of minorities. After all, artificial intelligence is just a huge database with a more complex operation

<sup>32</sup> See "Big Data, AI and China's Justice: Here's What's Happening", *China Justice Observer*, 1-12-2019. <https://www.chinajusticeobserver.com/a/big-data-ai-and-chinas-justice-heres-whats-happening>. See also Jie-jing YAO / Peng HUI, "Research on the Application of Artificial Intelligence in Judicial Trial: Experience from China", *Journal of Physics: Conference Series*, vol. 1487, 2020. <https://iopscience.iop.org/article/10.1088/1742-6596/1487/1/012013/meta>.

<sup>33</sup> See NIEVA FENOLL, *Inteligencia artificial y proceso judicial*, Madrid 2018. QUATTROCOLO, S., *Artificial Intelligence, Computational Modelling and Criminal Proceedings*, Springer, 2020.

<sup>34</sup> Vid. PÉREZ COLOMÉ, "Así sabe la policía si tu denuncia es falsa (y acierta un 91% de veces)", *El País*, 17-9-2018, [https://elpais.com/tecnologia/2018/09/16/actualidad/1537135174\\_883514.html](https://elpais.com/tecnologia/2018/09/16/actualidad/1537135174_883514.html)

<sup>35</sup> BROMBY, Michael C. / HALL, Maria Jean, "The Development and Rapid Evolution of the Knowledge Model of ADVOKATE: An Advisory System to Assess the Credibility of Eyewitness Testimony Article", January 2002, pp. 143 y ss, <https://www.researchgate.net/publication/228189761>, y [https://www.researchgate.net/figure/ADVOKATE-Witness-Compellability\\_fig3\\_228189761](https://www.researchgate.net/figure/ADVOKATE-Witness-Compellability_fig3_228189761). NISSAN, Ephraim, "Digital technologies and artificial intelligence's present and foreseeable impact on lawyering, judging, policing and law enforcement", *AI & Society*, 2015, p. 5.

<sup>36</sup> NORTHPOINTE INC., "Practitioners Guide to COMPAS", 17-8-2012, [http://www.northpointeinc.com/files/technical\\_documents/FieldGuide2\\_081412.pdf](http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf). LARSON, J. / MATTU, S. / KIRCHNER, L. / ANGWIN, J., "How We Analyzed the Compas Recidivism Algorithm", *Propublica*, 23-5-2016, <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>. PEARSON, Jordan, "Bail algorithms are as accurate as random people doing an online survey", *Motherboard*, 17-1-2018, [https://motherboard.vice.com/en\\_us/article/paqwmv/bail-algorithms-compas-recidivism-are-as-accurate-as-people-doing-online-survey](https://motherboard.vice.com/en_us/article/paqwmv/bail-algorithms-compas-recidivism-are-as-accurate-as-people-doing-online-survey). THADANEY ISRANI, Ellora, "When An Algorithm Helps Send You To Prison", *The New York Times*, 26-10-2017, <https://www.nytimes.com/2017/10/26/opinion/algorithm-compas-sentencing-bias.html>. TURKE & STRAUSS LLP, "Algorithms and criminal sentencing", <https://www.turkestrauss.com/2016/06/algorithms-and-criminal-sentencing/>

<sup>37</sup> LARSON, Jeff / MATTU, Surya / KIRCHNER, Lauren / ANGWIN, Julia, "How We Analyzed The Compas Recidivism Algorithm", *Propublica*, 23-5-2016, <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>. DRESSEL, Julia / FARID, Hany, "The Accuracy, Fairness,

than usual that is conducted through so-called algorithms, which are what allow the application to manage data, even offering the judgment alternatives of the case. This design of the algorithms can be influenced, naturally, by the computer scientists that configures them. For this reason, enormous political—democratic—care must be taken in the selection of that people and in the control of their work, so that they do not introduce authoritarian biases, or simply personal trends, into the algorithm. It has already happened<sup>38</sup>, and therefore States must be very aware that the risk is real.

The proposal made here is to find out if consumer claims are classifiable with some ease, which must be evaluated, using information that is, in fact, already available on several websites<sup>39</sup>, but in much more detail, from consumer arbitration boards but also from companies' claims departments. If the answer to that question is positive, as it is, the next step is to select the complaints that are most frequent and that, in addition, tend to be similar both in the allegations presented by the consumer and in the defences offered by the traders. If so, this means that the jurisdictional response can also be predictable, opening the way for its automation through artificial intelligence algorithms.

If all of the above is possible, the response capacity of the judges who use artificial intelligence will increase to rates never seen before, and litigation can be resolved in a record time of a few days, basically those that are considered convenient to offer to the trader to prepare his defence, taking into account that these are repetitive cases and, therefore, of highly predictable response, which greatly simplifies the alternatives for this defence and decision. If this is the case, claims that currently take weeks to be resolved before the Consumer Boards or months and up to a year by the courts, would be settled long before the consumer feels the tension or fatigue that usually makes them give up their claims.

This automatisisation task is not a job that a ministry of justice can carry out alone, but rather requires specialized computer scientists. But what ministries can do is to start preparing this task, carrying out the work to which I referred before classifying claims, defence arguments of both parties, usual evidence and more frequent alternatives of application of the legal system. With all this, the work of computer scientists will already be well advanced, because what they always ask for is that type of data to apply their technical knowledge.

Doubts will only arise in terms of the unexpected defence arguments, which after being reviewed by the application and discarding that they are

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And Limits of Predicted Recidivism", *Science Advances*, 17-1-2018, <http://advances.sciencemag.org/content/4/1/eaao5580.full>.

<sup>38</sup> TORRES MENÁRGUEZ, Ana, "Kate Crawford: "Los ricos temen la rebelión de las máquinas, no tienen otra cosa de la que preocuparse", *El País*, 18-6-2018. [https://elpais.com/tecnologia/2018/06/01/actualidad/1527868778\\_834780.html](https://elpais.com/tecnologia/2018/06/01/actualidad/1527868778_834780.html).

<sup>39</sup> Vid. <http://consum.gencat.cat/es/consultes-i-reclamacions/reclamacio-queixa-denuncia/>

inscribable arguments in the established categories, appear as really novel. At that time, human intervention will be necessary, in this case of a judge, in order to evaluate that factual or legal argument, issuing the final decision by traditional means.

The whole system could be set up in an experimental way until a good operation with hardly any errors is obtained, which requires some time, but is not wasted time at all. At the same time, a legal reform should be promoted so that this telematics procedure is possible and is considered compatible with the right of defence, which should not raise doubts if its operation and efficiency are shown in a transparent manner.

Perhaps this will be inspiring for the courts, which will begin to yearn for similar procedures to reduce their workload, and which should already be foreseen in our procedural laws, thus saving an extraordinary volume of processing that currently overwhelms the clerks of the tribunals, who spend their days acting mechanically like machines, covered by a tangle of bureaucratic paperwork that perhaps made sense before the existence of computer science, being completely inefficient right now.

In this new reality, other problems will emerge, especially over the necessary disclosing of algorithms<sup>40</sup> or about its elaboration, in order to prove beyond any reasonable doubt the independence / impartiality of the tool, as well as its compatibility with the right of defence. Although at the beginning the AI tool will generate doubts and even reluctance, its use will soon lead to a quick, cheap and predictable solution for consumer complaints, which is what we all want.

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<sup>40</sup> Cfr. *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).