 DOI: https://doi.org/10.15388/PhDStudentsConference.2023.9

THE FUTURE OF DEFENCE RIGHTS IN THE LIGHT OF THE MCDONALDISATION OF CRIMINAL JUSTICE SYSTEMS

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Key words: efficiency, calculability, predictability, controllability

Abstract. Alongside the process of globalisation, from which no state can escape today, there appears to be an underlying "Americanisation of the world", which is reflected essentially in the worldwide export of American industry and capital, but also of ideas, customs, and social habits. Among these habits, the American sociologist George Ritzer has highlighted the spread of fast-food chains which, according to him, is less a sign of the generalisation of a way of consuming than the implementation of a way of thinking. Indeed, Ritzer observed that contemporary societies have gradually abandoned the traditional way of reasoning in favour of more rational ways of thinking, similar to fast food chains, which rely on efficiency, calculability, predictability and the use of new technologies. Described as "McDonaldisation", in reference to the famous multinational fast-food corporation, this phenomenon of rationalisation is affecting "more and more sectors of American society as well as the rest of the world" due to cultural homogenisation resulting itself from globalisation. Indeed, the American justice system as well as "the rest of the world", such as many European legal systems, are also concerned by it, particularly regarding their criminal procedures, which are increasingly under the influence of this process of "McDonaldisation". The relatively recent use of guilty pleas for individuals and legal persons, the use of sentencing guidelines and the increase in predictive justice in criminal matters reflect the key aspects of "McDonaldisation" mentioned above, namely efficiency, calculability, predictability, and the use of new technologies. However, this streamlining trend harms the defence rights placed at the heart of criminal procedures in general, such as the right to a fair trial, the right to an independent and impartial tribunal, the presumption of innocence and the individualisation of punishment.
This paper therefore examines the future of these fundamental rights in the light of the "McDonaldisation" of criminal justice in America and in various European States and focus on the new principles that now guide it.

INTRODUCTION

"Think slowly, but execute your decisions quickly", Isocrates advised Demonicos. Two millennia later, the Greek philosopher's advice seems to have found favour with American and European criminal courts, which are more sensitive to the idea of swift judicial intervention. However, in our society of short time, the time has come not so much for "slow thinking" as for quasi-instantaneous, preconceived, rationalised thinking, similar to the way a fast-food restaurant operates, where decision-making is just as fast as its execution. Transposing, or even imposing, such an operation on criminal courts threatens the future of fundamental rights in criminal matters to a greater degree, particularly defense rights, the exercise of which conversely leads to a lengthening of judicial time.

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The exponential establishment of fast-food chains across the globe, driven by rampant globalisation, is not only leading to a general rationalisation of consumption but also, indirectly and more broadly, to a disruption of the bureaucratic structure of our contemporary societies. As George Ritzer notes, fast food, which finds its highest expression in the McDonald's company, stands today as the paradigm of modernity and clearly breaks with the traditional Weberian model, which has, according to some, become outdated and inefficient. In fact, the phenomenon of "McDonaldisation" described by the sociologist is reflected in the diffusion of the characteristic principles of fast-food management in "increasingly large sectors of American society and the rest of the world", gradually abandoning their traditional model. Thus, in the United States as well as in some European countries, efficiency, predictability, calculability and control are no longer the guiding principles of the operation of a fast-food restaurant like McDonald's, but also of religion (Drane, 2001), medicine (Hayes & Wynyard, 2002), the media (Prichard, 1987), public education (Hayes & Wynyard, 2002) and criminal justice (Kemmesies, 2018; Bohm, 2006; Robinson, 2002; Shichor, 1997; Umbreit, 1999). The latter is indeed under the influence of this "McDonaldisation", as evidenced by the legislative inventions precisely designed in the light of the above-mentioned principles.

Thus, guilty pleas, sentencing guidelines and predictive justice reflect a rationalisation of American and European criminal justice which, paradoxically, takes the form of a diversion. Although the use of these tools tends, to a certain extent, to make justice 'more efficient' and 'more profitable', it is at the expense of a certain number of fundamental rights, foremost among which are the rights of the defence. The right to a fair trial, the principle of individualisation of sentences and the presumption of innocence are thus undermined by these rationalisations of judicial time, intended to short-circuit the criminal trial, the main forum for the expression of defence rights. As Georges Ritzer pointed out, the process of "McDonaldisation" of society comes up against "irrationalities produced by rationality itself" (Ritzer, 2008, p. 141-160) among which is dehumanisation. By analogy, there is therefore reason to consider that this same process leads to a "dehumanisation" of criminal justice, given the progressive erasure of human rights specific to criminal trials in favour of better management of the public justice service. This reversal of values, caused by the phenomenon of "McDonaldisation", necessarily raises questions about the future of the exercise of the rights of the defence in the United States and in Europe. Indeed, their evolution does not seem to be very encouraging in the light of the new principles that dictate public action in justice today.

Indeed, the implementation of the principles of efficiency (1), cost-effectiveness (2), predictability (3) and controllability (4) in criminal justice considerably weakens the scope of the most basic defence rights and legal principles.

1. EFFICIENCY: PLEA BARGAINING OR JUSTICE?

According to the American sociologist George Ritzer, efficiency is about choosing "the optimum means to an end" (Ritzer, 2008, p. 30) and increasing efficiency usually involves "streamlining various processes" and "simplifying products" (Ritzer, 2008, p. 72).

Given the large number of cases handled each year by criminal courts in the US and Europe, efficiency has long been a practical necessity, if often an unattainable goal. One of the first researchers to address the issue of efficiency in criminal cases was undoubtedly the American professor Herbert Packer, author of the so-called crime control model of criminal justice. In his book, *The Limits of The Criminal Sanction*, Herbert Packer distinguishes between two types of criminal process models, the due process model and the crime control model. While the former is primarily concerned with unconditional adherence to procedural legality and individual liberties, the latter model primarily seeks procedural efficiency in crime control, implying both speedy proceedings (by reducing formalisms) and certainty of conviction (by reducing the number of appeals). Packer (1968, p. 159) refers to this crime control model as an "assembly line" at the end of which criminal cases are simple, standardised products, free of any procedural hurdles. Herbert Packer's metaphor of the 'assembly line' is not insignificant as it explicitly refers to the concept of McDonaldisation.

Indeed, when a McDonald's customer orders one of the brand's burgers, he or she knows what to expect, because all burgers are identical and often prepared rapidly. But if a customer orders something different or something that is not already prepared, his or her special order will necessarily need more time to be prepared. This person's order has inevitably slowed down the assembly line and reduced efficiency. This is also true in criminal justice systems because when defendants ask for something "special", like a traditional trial, the assembly line is slowed down and efficiency is reduced. Indeed, if a defendant chooses to proceed to trial, his or her case will be treated formally and will be considered unique, as no two cases are identical in their circumstances or in the way they are treated. To increase efficiency – i.e. speed and finality – the crime control model favours plea bargaining (Packer, 1968, p. 162), the epitome of the McDonaldised criminal justice process (Bohmer, 2006, p. 129). To put it simply, plea bargaining is an agreement between a defendant and a prosecutor in which the defendant agrees to plead guilty to some or all the charges against him and to forego his right to a jury trial in exchange for a more lenient sentence from the prosecutor. As the adversarial phase associated with traditional trials is eliminated thanks to the defendant's "confession", plea bargains can be offered and accepted within a relatively short period of time and cases are handled consistently, as the mechanics of a plea bargain are basically the same; only the content of the agreements differs. In this way, criminal cases can be settled more quickly and the criminal courts, which are confronted with more and more cases daily, can be relieved. As far as McDonaldisation is concerned, plea bargains streamline and simplify the administration of justice and seem to be the perfect mechanism to achieve efficiency (Bohmer, 2006, p. 130).

But should not the effectiveness of criminal justice be measured by the means employed in the search for truth? Can, a system in which the accused waives both formal and substantive truths be reasonably said to be effective? If a defendant's confession proves effective at the procedural level, it raises a danger at the substantive level. Indeed, there is a great risk that retaliatory measures will be taken against defendants who simply assert their rights to a trial, or that convicting innocent people will increase[2], particularly when the financial factor is taken into account.

2 *See under.*

2. CALCULABILITY: TIME IS MONEY WITH HIDDEN COSTS

According to Ritzer's analysis, calculability refers to "the prioritisation of quantitative methods so that they become a 'surrogate' for qualitative assessment" (Condon, 2018, p.5), so that "measures of time, money and quantity determine the value of production, goods and services. In colloquial terms, faster and cheaper are synonymous with better" (Condon, 2018, p.5).

By voluntarily waiving their trial rights through a plea bargain process – namely the right to a fair trial, the right to a jury and the right to confront witnesses – defendants enable criminal proceedings to be disposed of more quickly and thus save the expense of a lengthy trial. Likewise, by offering a reduced sentence or the number of charges to defendants who wish to enter into a plea bargain agreement, prosecutors can then avoid a time-consuming trial and preserve scarce resources for the cases that need them most. Thus, both time and money make plea bargaining attractive to all parties involved, and one might then think that, as it is *quicker* and *cheaper*, plea bargaining is therefore "better" than classic adjudication, as compromise is better than conflict. However, while plea bargaining's cost and time effectiveness seem very appealing, some arguments oppose plea bargaining on a more ideological and moral ground. As Ritzer highlighted, calculability "does not take into account an important point, however: the high profits of fast-food chains indicate that the owners, not the consumers, get the best deal." (Ritzer, 2000, p.17). In comparison, if defendants, by agreeing to pleading guilty, can avoid the time and cost of defending themselves at trial, they aren't necessarily the ones getting the "best deal" out of it. Quite the contrary in fact. By "purchasing his or her procedural entitlements with lower sentences" (Easterbrook, 1992, p. 1975), prosecutors, with the assistance of the defendant's attorney, now have ownership of his or her procedural rights with the "high profits" resulting from it. If, in theory, plea bargaining relies upon a person's consent to waive his or her trial rights, how can it possibly be a 'consensual' process when facing the punishment powers of the state? Although defendant autonomy is central to the legitimacy of plea-bargaining systems, thorough research in the US[3] and Europe[4] show that defendants are often induced or coerced to engage in plea bargaining systems, raising fundamental concerns that 'consent' is quite illusory and that plea bargaining does not adequately protect people from the risk of miscarriages of justice. Even though the legal justifications for plea bargains emphasise that the defendant makes the confession voluntarily, thus preserving the right to a jury trial, the right not to incriminate oneself and the right to confront witnesses, they prove to be insufficient in practice.[5].

Indeed, the most common criticism of plea-bargaining is the threat of much harsher sentence after trial, putting undue pressure on defendants and causing them to abandon the procedural protections

3 We could mention the work of the Vera Institute of Justice, *In the Shadows : A review of the Research of Plea Bargaining*. William Young, (then) Chief Judge, U.S. District Court, even said in a decision that the "entire [U.S.] criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen".

4 Efficiency over justice: insights into trial waiver systems in Europe, December 2021.

5 Johnson M., *Consequences of Plea Bargaining: In Consideration of the Rights of the Accused*, website Columbia Undergraduate Law Review, January 18 2022.

of trial. As a commentator put it, it is somewhat hypocritical to use "an elaborate trial process as window dressing, while doing all the real business of the system through the most unelaborate process imaginable" (Scott & Stuntz, 1992, p. 1912) and that the disparity of bargaining power between the government and the accused makes the process of criminal defence inaccurate and unfair, particularly for poor and unsophisticated defendants (Blank, 2000, 2016). Indeed, the criminal justice system is often seen by many as a "machinery stacked against the poor" (Viano, 2012, p. 120)[6]. The reason for this is the complex and opaque procedural processes that require skilled, experienced and expensive legal counsel to deal with the allegations and save the accused from a guilty verdict. But the lower middle class and the poor often cannot afford experienced legal counsel. Therefore, they have no choice but to accept the prosecution's offer, which may or may not include a reduced sentence, and solve their legal problem in the hope of serving no or a shorter prison term. Faced with the real possibility of receiving a harsher sentence and being "offered" a shorter prison term (which can still be substantial), many innocent people, especially when a capable lawyer is not affordable, actually have no choice but to plead guilty and accept the prosecution's offer. In other words, the system makes them to give a false confession of guilt that has serious consequences for the rest of their lives. If they decide to fight the charges, they could lose, especially if they have to rely on *pro bono* or court-appointed lawyers who may also be seeking a speedy case resolution, as they are receiving only a small fee per case and have very limited resources to search for any material exculpatory evidence. As a matter of fact, defence lawyers, who should be carefully examining the evidence and examining the case to assess the weaknesses of the prosecution's case and the strengths of the defence's case, actually do a less thorough job when a settlement is in sight than they would if they were preparing for trial (Lieberman, 1981, p. 557-583). Furthermore, overworked and under resourced prosecutors facing heavy caseloads and a lack of resources may also be inclined to offer plea deals in cases they cannot properly investigate[7]. In the end, the accused may be told by both the prosecution and the defence that if he does not cooperate and accept the confession, he will face a long prison sentence in order to avoid a long and costly trial. In such a context, it is questionable whether anyone will voluntarily give up their rights. Instead, their decision to settle is not determined by the strength of the evidence against them or their actual guilt or innocence, but by the fear of the consequences of a trial. Therefore, the concept of autonomy becomes a legal fiction at the expense of the accused, who is likely to make the "worst deal" of his or her life when in fact he or she is innocent or admits to being guilty of a charge that does not correspond to what actually happened.

This trial waiver system, which relies on so-called compromise rather than on confrontation, actually compromises justice itself, threatening the very essence of justice. In making the trial optional along with the procedural rights that attach to it, and form the fundamental right to a fair trial, the

6 The Council of Europe also indicated that « ***The poor are especially vulnerable to discrimination*** *in the administration of justice.* ***Poor people are often unable to obtain court protection****, because they do not have enough money to pay for legal representation. In cases where free legal aid is available, poor people may still lack the necessary information and confidence to seek justice before the court".*

7 Efficiency over justice: insights into trial waiver systems in Europe (2021), p. 42-43.

goal is no longer about justice. Instead managing caseloads "take[s] precedence over the search for a qualitative adaptation of criminal sanctions, to the point that the fact of responding sometimes seems to count more than the response itself." (Gautron, 2014, §23). In this sense, the question of criminal liability has changed from a qualitative question of "yes or no" to a quantitative one of "how many" or "how much" (Fisher, 2004, p. 1005) and, in this process, defence rights to a fair trial becomes a secondary consideration. Beyond reshaping criminal justice, calculability thus creates a reversal of values where even the exercise of fundamental rights has a cost, regardless of their sacred nature. Though, if "everything" has a price, should "everything" be offered for sale?

3. PREDICTABILITY: SENTENCING GUIDELINES ARE THE ANSWER AND THE PROBLEM

McDonald's' successful model may suggest that many customers have come to prefer a predictable world. Predictability by always providing the same products and services everywhere gives comfort to customers in knowing that McDonald's "offers no surprises" (Ritzer, 2000, p.17). In relation to the criminal justice system, predictability would mean, among other things, that similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes, regardless of the jurisdiction in which they are to be found.

Since 1987, to reduce sentencing disparities, the United States has used non-binding rules that set out a uniform sentencing policy for defendants convicted in the United States federal court system, known as "sentencing guidelines". As their name suggest, these federal guidelines help judges in determining a sentence through structured, step by step sentencing decision-making by providing for "very precise calibration of sentences, depending upon several factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his facts"[8] and take the form of a scale of sentences. Some European countries have adopted similar sentencing guidelines, for example, the United Kingdom[9], the Netherlands[10] and France[11].

If these guidelines are not mandatory, U.S. judges must consider them when determining a criminal defendant's sentence, since the United States v. Booker[12] decision, 543 U.S. 20 (2005). Indeed, when a U.S. judge determines within his or her discretion to depart from the guidelines, the judge must explain what factors warranted the increased or decreased sentence. The same applies to UK judges who must also provide grounds for their decision to depart from the sentencing guidelines (Chan, 2014, p. 256). Such obligation is an excellent way of getting judges to comply with the guidelines,

8 Payne v. Tennessee, 501 U.S. 808, 820 (1991).

9 In the United Kingdom, the guidelines are specific to each offence and consist of documents that are often quite long and detailed, describing the various aggravating and mitigating factors of the offence and each associated sentence is scaled.

10 In the Netherlands, it consists of 74 offence-specific guidelines which provide a sentencing starting point and *offence-specific* sentencing determinants.

11 In France, studies have shown that, while not being public, magistrates use sentencing guidelines that take the form of a sentencing scale depending mainly on the defendant's criminal record and offense.

12 United States v. Booker, 543 U.S. 20 (2005).

given their heavy workload. Therefore, the sentence guidelines, and the predictability they envision, remain the ballast of sentencing decisions in the United States and in the United Kingdom. As the U.S. Supreme Court recently considered that the federal sentencing guidelines provided "an estimable anchor for sentencing decisions"[13] and the Justices continue to underscore this point, variously referring to the guidelines as the starting point and initial benchmark, and even characterized the guidelines as the "lodestone" of federal sentencing[14]. Similarly in France, where sentencing guidelines in criminal matter are not as transparent[15], a scientific study carried out in several jurisdictions has demonstrated the normative force of these guidelines in that judges are obliged to refer to them, but they are not binding them, so judges can deviate from the recommended sentence. However, the same study showed that the judge's freedom to deviate from the proposed sentenced is more or less restricted depending on the court's policy.

Although the American, British or even French criminal law offer a very rich range of criminal sanctions, this range is hardly used in practise and that a standardisation of sentencing can easily be observed in all jurisdictions. This standardisation in the choice of sentencing is largely, but not exclusively, explained by the fact that the situations judges have to deal with are to some extent recurrent and repetitive, especially in mass cases, as in other countries. As a result, judges are naturally led to intuitively and unconsciously apply the standards that they have equally intuitively and unconsciously established, and which are more or less influenced by the prosecution's criminal policy. However, at least in French law, this standardisation of sentencing breaks with its individualisation, a principle according to which the judicial decision must be an "individual, unique and non-repeatable decision" (Sayn & Bouilloux, 2014, p. 13). Indeed, according to this principle, the judge is required to determine a sentence that matches the gravity of the offence, and which is considering the material, professional, social and family background of the offender, his or her personality and the circumstances that led him or her to commit the offence for which he or she was convicted. But as sentencing guidelines consist of assigning defendants and their backgrounds to a category to which a sentencing is attached, it obviously leads to a standardisation of sentencing.

While this avoids excessive disparities between decisions delivered within the same jurisdiction or from one jurisdiction to another, in the meantime it also undermines sentencing individualisation and limits the judge's discretion in choosing the appropriate punishment, especially when dealing with mass cases. Moreover, the use of sentencing guidelines may also lead to an excessive uniformity of decisions and thus affects the proportionality between offence and punishment. While they aim to reduce undue inequalities by limiting the variability of sanctions, in doing so they may undermine the proportionality between the offence and the sanction and, thus, prevent the punishment from fitting the offence better. An empirical study conducted by Professor Waldfofgel shows that the reduction in unwarranted inequality made possible by sentencing guidelines does not compensate for the loss of proportionality and thus undermines the use sentencing guidelines. According to Pro-

13 Peugh v. United States, 133 S. Ct. 2072 (2013), at 2083.

14 *Id.* at 2084.

15 Joseph-Ratineau Y. (2019), *Barémisation et droit pénal*, Mission de recherche Droit et Justice.

fessor Waldfofgel, sentencing guidelines would eliminate both 'good' disparities (i.e. that related to the heterogeneity of cases) and 'bad' disparities (i.e. related to the judges' subjectivity, which may be influenced by extra-legal factors) unless they take into account all the characteristics of the case and the defendant that are relevant to determining the appropriate punishment (Waldfofgel, 1998, p. 294). In other words, the problem with using sentencing guidelines would actually be "uniformity", not "disparity" (Schulhofer,1992), which underlines one of the "irrationalities of the rationality" (Ritzer, 2008, p. 141) of such system.

In any case, the use of sentencing guidelines, which may raise strong concerns, is in fact the immediate result of the use of management tools in the justice system, and a further sign of the McDonaldisation phenomenon, even described by some authors as "McSentencing" (Hamilton, 2013). Indeed, this is result of a public spending management policy that openly requires judges to be more efficient in their day-to-day management of a large volume of cases. Given this context, knowing that courts must always resolve cases faster and better, without any real additional or adequate resources, this can only lead to judges unconsciously following sentencing guidelines in order to free up more and more time to focus on less massive, technical cases.

Thus, behind the tool function of sentencing guidelines, which aims to improve equal treatment between defendants by reducing the risks of sentencing disparities in similar cases, lies a managerial function which, by seeking efficiency above all, leads necessarily to the standardisation of criminal decisions. Moreover, if the sentencing guidelines provide a solution to the problem of sentencing disparities, which may or may not be satisfactory, they undoubtedly raise the question of the balance between the individualisation of punishment and the equal treatment of defendants, the essence of the judges' discretionary power and, more broadly, what society expects of its judges. This balance is even more challenged in a world where decision-making tools are multiplying and are questioning the judiciary's added value in decision-making, particularly in the age of artificial intelligence.

4. CONTROL: IS ARTIFICIAL INTELLIGENCE THE NEW THREAT?

The dimension of control is attained "...especially through the substitution of nonhuman for human technology..." (Ritzer, 1996, p. 11). This tendency enables the company to control the uniformity of production much better. This raises the question of the use of artificial intelligence in the administration of criminal justice or "predictive justice". While this kind of technology may represent a panacea for criminal justice systems by reducing case backlogs, it may also further endanger fundamental rights and principles.

In the United States, where the actual use of artificial intelligence in criminal justice is the most advanced to date, the decision on a risk assessment algorithm in *Loomis v. Wisconsin* (2016)[16] was sobering. The algorithm identified Loomis as a person who posed a high risk to society due to a high risk of recidivism, and the trial court decided to deny his application for parole. On appeal, the

16 Loomis v. Wisconsin, 881 N.W.2d 749 (Wis. 2016).

Wisconsin Supreme Court ruled that the algorithm recommendation was not the sole reason for denying his application for parole and therefore the trial court's decision did not violate Loomis' right to due process. In upholding the constitutionality of the risk assessment algorithm, the Wisconsin Supreme Court failed to consider the strength of the 'automation bias'. In asserting that the lower court had the power to deviate from the proposed algorithmic risk assessment, the court ignored social psychology research and human-computer interaction research on bias in all algorithmic decision-making systems, which show that once a high-tech tool makes a recommendation, it becomes extremely troublesome for a human decision-maker to refute such a recommendation. In short, the Supreme Court of Wisconsin has recognised the importance of the role of the judge, and that this type of software would not replace him but may assist him. Nevertheless, decision-makers regularly evaluate automated recommendations more positively than not, even though they know that such recommendations can be inaccurate, incomplete or even wrong (Završnik, 2020, p. 574) which raises the question of the judge's independence.

Indeed, it is the judges' independence that is most threatened by artificial intelligence, and particularly regarding private companies that develop and market predictive justice software. Predictions will also most likely have an impact on the verdict because as soon as the algorithm indicates a probable solution, the judge will certainly be influenced, and the greater the probability, the more he or she will be influenced. Out of a sense of comfort and the desire of being well-considered by his or her peers, he or she will probably follow this prediction and there is a great risk that he or she will decide the case not based on the case put before him or her but on pure statistics. From a legal point of view, this is a form of dependence on the implicit powers exerted by the developers of the algorithms, which is more reprehensible because companies' goals generally do not concern the common good, but purely economic private interests. Furthermore, this brings the risk of herd effect as these tools provide an in-depth analysis of previous case law. A judge will be able to observe, for example, that most of his or her colleagues have taken the same decision in similar cases. He or she will feel pressured to do the same or feel relieved of the responsibility of having to take a personal decision by following the majority. The judge's independence and freedom can therefore be threatened by software that could push to group conformism. According to the European Commission for the Efficiency of Justice, "judicial decision-making tools must be designed and perceived as an auxiliary aid to judicial decision-making, facilitating its work, and not as a constraint"[17]. Indeed, it considers that "respect for the principle of independence requires that everyone can, and therefore should, take a personal decision as a result of a reasoning that they must be able to assume in their personal capacity, regardless of the computer tool"[18]. But even the way of reasoning may be influenced by the use of such tool, especially in civil countries, most of them being European. Indeed, countries such as France, Italy or Germany, the judge applies the law to specific cases, in order to comply with the separation of powers and equal treatment between citizens, who are thus subject to the same

17 European Commission For The Efficiency Of Justice (CEPEJ), *Guidelines on how to drive change towards Cyberjustice* (2016).

18 *Id.*

rules. With predictive justice, the judge is no longer required to search for the applicable general rule of law, but to check whether the solution presented to him or her, at the end of the computer process, matches the one he or she has to judge. The judge should check whether the case to be judged is identical to a case that is statistically meaningful according to the software, i.e. to one or more cases that have already been judged. The syllogistic method, particular to civil law countries, is thus rejected in favour of an approach similar to that of common law judges, which results in giving authority to legal precedents and which also explains why these software programs are generally more developed in Anglo-Saxon countries such as the United States and the United Kingdom, than in continental law countries. However, in addition to the change in the intellectual reasoning of judges, the "factualisation of the law" (Croze, 2017) is also to be feared, given the way in which data is processed by predictive justice software. Indeed, with predictive justice, all elements are put on the same level and transformed into computer data, whether they are legal data or facts. This initial coding makes it possible to process them and to make comparisons to obtain statistics. Fact and law are reduced to the level of information and law becomes a fact like any other. This is a potentially important change in the judge's role. Whereas the judge's task is normally to find the applicable law and while the parties' role is to provide the facts, predictive justice seriously disrupts this scheme, since facts and law no longer exist as distinct categories. Therefore, the judge must remain in control of the procedure at all levels.

This makes it even more important for judges to remain in charge of the process, that algorithms are not always transparent and that questions arise about the quality of the data on which they are based, which also raises concerns about the right to a fair trial, which includes the right of the accused to participate effectively in the trial process. To ensure the latter, the accused should be able to challenge the algorithmic result that forms the basis of his or her conviction. However, the problems posed using artificial intelligence are very similar to those posed by anonymous witnesses or undisclosed evidence, as it is opaque. At least some level of disclosure is necessary to ensure that an accused has an opportunity to challenge the evidence against them and to balance the burden of anonymity. Anonymous witnesses, while not *per se* incompatible with the right to a fair trial, can only participate in criminal proceedings as a last resort and under strict conditions that ensure that the accused is not disadvantaged. Such a rule should also apply to the use of artificial intelligence in criminal justice so that a fair balance should be struck between the right to participate effectively in the trial on the one hand and the use of opaque artificial intelligence to help judges more accurately assess the future behaviour of the accused on the other.

CONCLUSION

The goals of efficiency, predictability, calculability and controllability, which are often sought by governments, seem to be praiseworthy when they serve defendants' interests, such as the benefit of a faster, less costly and fairer decision. But is this not some kind of marketing process to reflect the watered-down image of justice? Could it not be a form of a "judicial-washing" that hides in real-

ity a phenomenon of "McDonaldisation" that is taking shape at the expense of defendants' rights? If the concept of "McDonaldisation" used to describe criminal justice systems isn't perfect, as no metaphor is, describing them as such will, hopefully, encourage people to debate, and implement alternatives that will improve criminal justice systems across the globe and preserve the future of fundamental defence rights.

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