

# Profiling of judges

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## **Introduction**

*Data mining and AI are increasingly becoming an integral part of the legal profession. Searching precedent and statutes is now done in a few seconds and most legal documents are available in standard format instantaneously. There seems to be no reason to question the advantages of such technology.*

*Technology does however pose major challenges to our justice system in several regards.*

*This article will discuss the recent French law on “legal analytics” (i.e. technology enabled profiling of judges).*

*Such profiles are meant to identify personal predilections and preferences (maybe even bias).*

*The French legislator recently decided to prohibit the use of these technologies in and for the courtroom.*

*After a presentation of the law, the discussion will cover the following topics:  
The judge as an institution, its legislative and cultural background (a)  
Forum Shopping, (b)  
Disciplinary and Penal Oversight, (c)  
Invasion of Privacy, (d)  
Human Rights, (e)  
Extraterritoriality, (f)  
Compatibility with EU law, (g)  
Derogations from the GDPR (h) and  
The slippery slope theory (i), and finally a conclusion on the more general question of technology in the justice system.*

# Who judges the judges?

It seems to be common and even accepted practice that “you never know what happens in a court case”.

The outcome is unpredictable or “aléatoire” as they say in French.

What ever the reasons for the perceived “inevitability” of “subjective” justice (we seem to accept the unpredictable nature of judgments as if it were a law of nature despite its glaring incompatibility with foundational principles of democracy like the rule of law and egalitarian and predictable justice), we may now finally thanks to technology possess a cure or at least a safeguard against judicial arbitrariness, bias and unpredictability.

There is a gaping contradiction between subjectivity and the very notion of justice: same facts same judgments.

Of course a certain degree of judicial discretion is unavoidable.

There is however a compelling difference between such discretion and bias or subjectivity. While the former is the power or right to make decisions using reason and judgment to choose from equally acceptable alternatives the latter is based on facts or predilections (momentary or convictional) of no relevance to the exercise of judgment in accordance with the rule of law. The exercise of judicial discretion is implied in the US Constitution Art III, Section 2 and in France it follows indirectly from Article 64 of the Constitution, which provides for the independence of the judicial branch. Judicial discretion is subject to oversight while subjectivity seems less regulated.

Several studies have demonstrated that judges may be influenced just like the rest of us (why should that be surprising?) by all sorts of extraneous facts and that personal beliefs, idiosyncrasies and bias are often decisive features in decision-making.

In a brilliant Ted Talk given in September 2018 at the TEDxFulbrightDublin event, Dr. Brian Barry describes research conducted on the importance of bias (including implicit bias) in judgments.<sup>1</sup>

Here are some examples:

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<sup>1</sup> See [https://www.ted.com/talks/brian\\_barry\\_how\\_judges\\_judge](https://www.ted.com/talks/brian_barry_how_judges_judge) [accessed April 14th 2020]. Dr. Brian Barry, Lecturer in Law at Dublin Institute of Technology: [brian.barry@tudublin.ie](mailto:brian.barry@tudublin.ie) (<http://www.dit.ie/llss/people/law/staffarticles/name116058en.html>) [accessed April 14<sup>th</sup>. 2020] <https://www.theatlantic.com/education/archive/2016/09/judges-issue-longer-sentences-when-their-college-football-team-loses/498980/> [accessed April 14th 2020] <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2668&context=facpub> [accessed April 14th 2020].

Inadmissible evidence: oral testimony on the sexual history of a rape victim is inadmissible in court (with limited exceptions). However, in a mock trial experience where judges were separated into two groups, with one group hearing the oral testimony and the other one not subjected to it, the conviction rate in the first group came down compared to the second group (49% rate). Clearly it's hard to forget - once it's out.

Race bias: According to sentencing figures in the state of Louisiana in the years 1996-2012 when the football team of Louisiana State University, the Tigers (predominantly black players) lost games the judges tended to hand down harsher sentences against young black men.

Cognitive error/bias related to numbers: An experiment was made in which researchers asked judges to hand down an appropriate fine against a nightclub for noise pollution. Judges received the same facts, but were split into two groups. In the first group the nightclub was called "club 58". In the second group "club 11866". The fines against the second nightclub were on average three times higher than those levied against "club 58" (this is known as the "Anchoring Effect").

A judge's willingness to grant a prisoner parole wanes with time after lunch according to a famous study: Researchers from Columbia University in New York City and Ben Gurion University of the Negev in Beer Sheva, Israel, analyzed more than 1,000 parole decisions made during 50 days by eight experienced judges in Israel. The proportion of favorable rulings fell from about 65 percent to nearly zero during each session separated by the two food breaks, leaping back to 65 percent immediately after the breaks.<sup>2</sup>

The ability to influence judgment through rhetoric was discovered already by the Greek philosophers (Aristotle's *Ars Rhetorica*), further developed by the Romans (Cicero and Quintilian) and categorized by Schopenhauer in his wonderful book *The Art of Always Being Right: Thirty Eight Ways to Win When You are Defeated (or in German: Eristische Dialektik: Die Kunst, Recht zu behalten)* in which he demonstrates how easy it is to win an argument and how different that is from arriving at the truth.<sup>3</sup>

For all these reasons the use of AI in judgments is attracting increased attention from academia and policy makers.<sup>4</sup>

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<sup>2</sup> <https://abcnews.go.com/Health/MindMoodNews/hungry-judges-grant-parole/story?id=13347415> [accessed April 14th 2020].

*EMOTIONAL JUDGES AND UNLUCKY JUVENILES*, Ozkan Eren Naci Mocan, Working Paper 22611, NATIONAL BUREAU OF ECONOMIC RESEARCH 1050 Massachusetts Avenue Cambridge, MA 02138 (September 2016). Available at: <https://www.nber.org/papers/w22611.pdf> [accessed April 14th 2020].

<sup>3</sup> On rhetoric: Ross, W. D. (1959) *Aristotle Ars Rhetorica*. OCT. Oxford: Oxford UP. Cicero (2007) *The State of Speech: Rhetoric and Political Thought in Ancient Rome*. Princeton Press. Schopenhauer, A. (1831) *Eristische Dialektik: Die Kunst, Recht zu behalten* translated into English under the title *The Art of Always Being Right: Thirty Eight Ways to Win When You Are Defeated*, (2004), Gibson Square Books, ISBN 1-903933-61-7. Aristotle, *Ars Rhetorica*. Edited by W. D. Ross. OCT. Oxford: Oxford UP, 1959. Cicero, *The State of Speech: Rhetoric and Political Thought in Ancient Rome* (2007), Princeton Press; Quintilian, *Institutio Oratoria*, English Translation by Harold Edgeworth Butler (1920). Cambridge, Cambridge, Mass., Harvard University Press; London, William Heinemann, Ltd.

<sup>4</sup> Chen, Daniel L., *Machine Learning and the Rule of Law* (January 6, 2019). Computational Analysis of Law, Santa Fe Institute Press, ed. M. Livermore and D. Rockmore, Forthcoming. Available at

Nothing makes the point better than humor:

*A man was charged with murder but was acquitted. Afterwards he told his lawyer that he could prove he was innocent because he was in jail at the time the crime was committed.*

*“Why on earth didn’t you tell that to the court?” asked the lawyer.*

*“I thought that it might prejudice the jury,” said the man.*

This article will not address the above AI developments but the so co-called “legal analytics” i.e. the mining and analysis of publicly available data in order to predict the behavior of judges (their specific interests, attitudes, preferences etc.) - not replace them.<sup>5</sup>

A recent French law has banned legal analytics.

As far as I have been able to determine this is a unique initiative. Indeed no other country appears to have enacted similarly broad legislation.

The objective of this article is to describe the law and briefly explain its legislative history and the relevant French legal tradition in order for the initiative to be understood in its legislative and cultural context.

I shall also discuss some of the arguments for and against the law.

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SSRN: <https://ssrn.com/abstract=3302507> [accessed April 14th 2020]; Hao, Karen and Stray Jonathan, Can you make AI fairer than a judge? Play our courtroom algorithm game (October 17, 2019), MIT Technology Review. Available at <https://www.technologyreview.com/s/613508/ai-fairer-than-judge-criminal-risk-assessment-algorithm/> [accessed April 14th 2020]; A recent study and attempt to extricate bias from AI developed by Stanford University: “Achieving Fairness through Adversarial Learning: an Application to Recidivism Prediction” (30 June 2018), Christina Wadsworth, Francesca Vera, Chris Piech: <http://stanford.edu/~cpiech/bio/papers/fairnessAdversary.pdf> [accessed April 14th 2020]. In the US prediction technology is used in an attempt to reduce bias. As an example is the algorithm known as COMPAS which uses historic data to establish correlations in order to predict risks of recidivism and “help” determine the appropriate sanction. The challenge is obviously avoiding substituting “machine bias” for human bias. The challenge is obviously avoiding substituting “machine bias” for human bias.  
<sup>5</sup> In the following article the terms “legal analytics” and “profiling” shall be used interchangeably.

Profiling is not prohibited under the GDPR<sup>6</sup> – indeed it is considered to be a cornerstone of the business model of almost all Internet services and accepted as necessary for commercial retargeting (I shall revert to the GDPR below under point c)).<sup>7</sup>

The idea behind profiling is identifying areas of interest believed to capture the user's attention.

Sometimes these techniques may even be characterized as “persuasion technology” and with recent breakthroughs in neuroscience and social and cognitive psychology (in particular the recognition of emotions or “system 1” and “nudging” in decision making) it is becoming increasingly critical to understand the impact on professional judges of such techniques.<sup>8</sup>

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<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679> [Accessed April 14th 2020].

<sup>7</sup> Profiling is not prohibited under the GDPR in accordance with the Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (ARTICLE 29 DATA PROTECTION WORKING PARTY) adopted on 3 October 2017 and revised on 6 February 2018. The purpose of these guidelines is to clarify those provisions. The GDPR introduces It defines profiling in Article 4(4) as:

“any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements ». Both the Guidelines and the CNIL confirm that profiling is not illegal under the GDPR, but that caution must be exercised with regard to proper consent and enforcement of rights to access and rectification.

The GDPR makes an important distinction between profiling and automatic decision making. The latter is subject to strict conditions in accordance with Article 22. <https://www.cnil.fr/fr/profilage-et-decision-entierement-automatisee> [accessed April 14th 2020].

<sup>8</sup> On the importance of “fast” or “intuitive” decision making and the strong behavioral and cognitive influence of “System 1” see Kahneman, D. (2011) *Thinking, Fast and Slow*, Farrar, Straus and Giroux, ISBN 978-0374275631. Richard Thaler and Cass Sunstein, *Nudge* (2009). *Improving Decisions About Health, Wealth and Happiness*, Penguin, 5 mars 2009, 320 p. (ISBN 978-0141040011); Cialdini, R. B. (1984). *Influence: The Psychology of Persuasion* (ISBN 0-688-12816-5). Also published as the textbook *Influence: Science and Practice* (ISBN 0-321-01147-3). Fogg, B. J (2002) *Persuasive Technology: Using Computers to Change What We Think and Do*. Stanford: Morgan Kaufmann. Suskin, Thaler.

Psychological experiments in the field of social psychology and the importance of **bias**, prejudice, stereotypes, authority, “the norm” goes back a number of years. Among the pioneers and important contributors to this science may be cited: Moscovici, S (1969); Sherif, M. (1935). A study of some social factors in perception. *Archives of Psychology*, 27(187); Forsyth (1995); Theodore Newcomb (1943); Asch, S. E. (1951) (“The Asch Effect”). Effects of group pressure upon the modification and distortion of judgments. In H. Guetzkow (Ed.), *Groups, leadership and men*. Pittsburg, PA: Carnegie Press; Deutsch, M., & Gerard, H. B. (1955). A study of normative and informational social influences upon individual judgment. *The journal of abnormal and social psychology*, 51(3), 629; Smith, P. B., & Bond, M. H. (1993). *Social Psychology Across Cultures: Analysis and Perspectives*. Hemel Hempstead: Harvester Wheatsheaf; Larsen (1974); Abrams, Wetherell, Cochrane, Hogg and Turner (1990); Lamb and Alsifaki (1980); Milgram, Jost and Berguess (2000 on stereotypes); Allport and Postman (1947) on stereotypes, on the influence of prejudice and stereotypes in judgments or “categorical thinking” van Knippenberg, Dijksterhuis and Vermeulen (1999); Macrae and Bodenhausen (2000); Levav and Avnaim-Pesso, Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences* (2011); H.A. Butler (2017), Why do Smart People Do Foolish Things? Intelligence is not the same as critical thinking and the difference matters, *Scientific American* (3 October 2017).

These concerns have led to legislation in different countries restricting access to social media by juries.<sup>9</sup>

A different angle is the ability to predict judges' decisions on the basis of profiles identifying personal preferences and influence points developed on the basis of such technologies.

Should specific restrictions or maybe even prohibitions be imposed against such profiling?

This is the question that troubled the French lawmaker when as part of a general revision of the “Law on the Programming of Justice” it was faced with this dilemma: Should free speech and the right to information always prime when it comes to protecting the citizen against potential government abuse or arbitrariness or should certain categories of public officials be insulated from systematic profiling if such profiling might expose them to undue influence or somehow offer the opportunity to “game the system”.

The lawmaker decided to opt for the latter alternative and instituted a blanket prohibition against profiling of judges.

## **1. The French Law**

### ***Background and provisions of the law***

The law on “Judicial Organization” (No. 2019-222) passed on the 23<sup>rd</sup> of March 2019, but has yet to enter into effect in its entirety (not all of the necessary decrees have been promulgated and that includes the provision addressed in this article).<sup>10</sup>

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<sup>9</sup> In the case of *Dallas v. the United Kingdom* (11.2.2016 - (application no. 38395/12) the ECtHR found there was no violation of the principle of legality (Article 7 of the ECHR) where a juror had been convicted for contempt of court when researching defendant on the Internet. It was found that the law was sufficiently clear.

Interestingly Article 10 (freedom of information) was not argued. [https://hudoc.echr.coe.int/eng#{"itemid":\["001-160432 >\]}](https://hudoc.echr.coe.int/eng#{)

<sup>10</sup> <http://www.justice.gouv.fr/le-ministere-de-la-justice-10017/projet-de-decret-relatif-a-lopen-data-des-decisions-de-justice-32835.html> and [http://www.justice.gouv.fr/art\\_pix/projet\\_decret\\_open\\_data\\_20191120.pdf](http://www.justice.gouv.fr/art_pix/projet_decret_open_data_20191120.pdf) [accessed April 14th 2020] ; <https://bloglandotavocatsnet.files.wordpress.com/2019/03/loi-nc2bo-2019-222-du-23-mars-2019-de-programmation-2018-2022-et-de-rc3a9forme-pour-la-justice-legifrance.pdf> [accessed April 14th 2020].

The law is an integral part of the general “Open Government/Open Data” initiative as defined in legislation from 7 October 2016 (the so-called “Lemaire Law”).<sup>11</sup>

Article 33 (out of 110 articles) of the Judicial Organization Law makes it illegal to engage in “*legal analytics*” defined as “*data identifying judges and clerks with the objective or result of evaluating, analyzing, comparing or predicting their actual or supposed professional practice.*”<sup>12</sup>

The stated objective is to allow public and free access to all judgments (“the Open Government aspect”) and the prohibition in Article 33 is deemed to be the corollary of such access.

From a technical point of view Article 33 modifies the “*Judicial Organization Code*” and the “*Code of Administrative Justice*” (amending article L 111-13, subsection 2 and 3 of the Judicial Organization Code) by (1) providing for the removal of the names of parties (only natural persons - not legal entities) and any other data enabling the identification of such parties, third parties, judges and clerks “*if ... disclosure ... is likely to prejudice the safety or right to privacy of the individuals concerned or his/her relatives*” and (2) prohibiting profiling (“*legal analytic*”) of judges and clerks as explained above (“*Data identifying judges and clerks may not be reused with the objective or result of evaluating, analyzing, comparing or predicting their actual or supposed professional practice.*”).

Infringements carry the same penalty as the offense of collecting personal data by “*fraudulent, disloyal or illegal means*” stipulated in article 226-18 of the Criminal Code (i.e. a fine of up to 300.000 € and a prison sentence of up to three years).

Legal entities may be fined up to five times that amount (Article 131-38 of the Criminal Code).

In summary the idea behind the law is to prevent that the “*re-use*” of a judge’s decision “*... would allow the creation of profiles of the professionals of justice ... which could lead to pressure or a strategy of choice of jurisdiction which could pervert the course of justice.*”

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<sup>11</sup> La loi pour une République numérique (loi Lemaire), was promulgated on October 7, 2016. Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&categorieLien=id> [accessed April 14th 2020].

<sup>12</sup> Excerpt of Article 33 of the Law no. 2019-222 of 23 March 2019 on the 2018-2022 programme and justice reform: « *Les données d'identité des magistrats et des membres du greffe ne peuvent faire l'objet d'une réutilisation ayant pour objet ou pour effet d'évaluer, d'analyser, de comparer ou de prédire leurs pratiques professionnelles réelles ou supposées.* » When the government presented the Bill, it explained it was aimed at delivering swifter, more effective justice which is modernized to be in sync with the times (<https://www.gouvernement.fr/en/justice-2018-2022>) [accessed April 14th 2020]. It introduces a series of structural reforms such as: - simplifying civil proceedings (Title II), - easing the burden on administrative courts and improving the effectiveness of administrative justice (Title III), - simplifying and improving the effectiveness and implementation of the different stages of criminal proceedings from the investigation to the judgment (Title IV) while enhancing the meaning and effectiveness of sentences (Title V), - improving the overall organization of the judicial system: merge district and regional courts and implement a new organization for courts of appeal (Title VI).

In order to understand the reach of the prohibition let us first distinguish profiling from ranking sites.

An example of the latter would be The Robing Room website operating from the US.<sup>13</sup>

This type of sites may already violate Article 6 of the GDPR (failing to secure consent).<sup>14</sup>

This seems to be the view of the French Data Protection Agency (“CNIL”) (according to private discussions).

The question has not been tested yet.

Ranking sites allow third parties to post comments on particular judges and rank them accordingly.

These platforms do not perform independent processing.

Their activities/liability are in general subject to the case law developed pursuant to the European Court of Human Rights (“ECtHR”) judgment in the case *Delfi v. Estonia* and the e-commerce directive (see below under EU Law and Human Rights).

Profiling sites are different. They are not based on third party content or ranking, but on processing undertaken by the provider - typically for commercial reasons - on the basis of data collected from - in this case - public sources (the names of judges are only redacted “*if (...) disclosure (...) is likely to prejudice the safety or right to privacy of the individuals concerned or his/her relatives*”).

An example of such a site is [doctrine.fr](http://www.doctrine.fr) - a web site offering exhaustive case material and statistics on lawyers identified by name and accessible on a subscription basis.<sup>15</sup>

A complaint for lack of consent is pending before the CNIL. It is unclear whether one or more of the alternative processing bases may replace consent (art. 6 provides for alternatives to consent) in these instances.

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<sup>13</sup> [www.therobingroom.com](http://www.therobingroom.com) and [www.robeprobe.com](http://www.robeprobe.com) [accessed April 14th 2020].

<sup>14</sup> Article 6(1) of the GDPR: Lawfulness of processing 1. Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

<sup>15</sup> <https://www.doctrine.fr> [accessed April 14th 2020].



Both ranking sites and profiling sites could be subject to liability under (1) the aforementioned *Delfi v. Estonia* case law<sup>16</sup> and/or (2) the EU Regulation on platform- to- business relations.<sup>17</sup>

(1) The *Delfi* case held that it holding a platform liable under certain conditions for third party content (in casu defamatory statements inciting to violence) did not violate Article 10 (free speech) of the European Convention on Human Rights (“ECHR”).

Pursuant to the *Delfi* case the ECtHR handed down important judgments limiting the reach of the initial interpretation of the case.

In the Hungarian cases *Magyar Tartalomszolgáltatók Egyesülete and Zrt v. Hungary*<sup>18</sup> the scope was explicitly restricted to hate speech and incitement to violence. In the Swedish case *Rolf Anders Daniel Pihl v. Sweden*<sup>19</sup> the ECtHR again emphasized the necessary qualification of content as hate speech and incitement to violence.

In the event a ranking site were to allow such unprotected speech it could be held liable, but it is hard to imagine that professional profiling sites should engage in such speech.

(2) In addition to the liability regime under the *Delfi* judgment, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 (on promoting fairness and transparency for business users of online intermediation services) known as the “P2B Regulation” creates a specific liability standard in order to promote “...a fair, transparent and predictable business environment for smaller businesses and traders on online platforms”. The Regulation enters into effect on 12 July 2020 and may be seen as the first step towards stricter and broader platform liability to be incorporated into the Digital Services Act currently under development.

As it will be seen the P2B Regulation does not address the liability of legal analytics (not an “intermediation service”).

Consequently neither the GDPR (which does not prohibit profiling as we have seen) nor the above liability regimes were deemed sufficient by the French lawmaker for the purposes of prohibiting legal analytics.

In addition it was believed that a specific penal offense should be introduced.

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<sup>16</sup> [https://hudoc.echr.coe.int/eng#{"itemid":\["001-126635 »\]}](https://hudoc.echr.coe.int/eng#{)

Case of *Delfi AS v Estonia* ( 64569/09) of 16. June 2015 ( Grand Chamber).

<sup>17</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150> [accessed April 14th 2020].

<sup>18</sup> <http://hudoc.echr.coe.int/eng?i=001-187930> [accessed April 14th 2020]. Case of *Magyar Jeti Zrt v. Hungary* (11257/16). Judgment of 4 March 2019

<sup>19</sup> <http://hudoc.echr.coe.int/eng?i=001-172145> [accessed April 14th 2020]. Case of *Rolf Daniel Pihl v. Sweden* (74742/14) . Judgement of 7 February 2017.

## ***Constitutional review***

The law passed constitutional review before the Constitutional Council.<sup>20</sup>

In its decision no. 2019-778 DC of 21 March 2019, the “Conseil Constitutionnel” approved Article 33 almost in its entirety. It was slightly modified in order to allow legal researchers and law students to map decisions “*from a particular court and perform comparative analysis*”.

The Constitutional Council accepts that the lawmaker may curtail “*profiling of legal professionals*” which “*may lead to pressure or strategies of choice of jurisdiction likely to pervert the course of justice*”.<sup>21</sup>

The Council did not address the argument that legal strategies intended to “*pervert the course of justice*”, may already be prohibited as a disciplinary matter under the Unified Code of Ethics of the Bar Societies in France. It did also not subject the forum shopping argument to detailed scrutiny.

Let us take a closer look at these arguments:

### **2. The Case for and Against the Law**

Surprisingly little debate took place at the National Assembly (the bill passed with 31 MPs voting for and 11 against at the final vote - a turn out of some 7%) and media coverage has been almost non-existent.<sup>22</sup>

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<sup>20</sup> Conseil Constitutionnel, Decision no. 2019-778 of 21 March 2019.

<sup>21</sup> Paragraph 93 of the decision: “*En prévoyant que les données d'identité des magistrats et des membres du greffe figurant dans les décisions de justice mises à disposition du public par voie électronique ne peuvent faire l'objet d'une réutilisation ayant pour objet ou pour effet d'évaluer, d'analyser, de comparer ou de prédire leurs pratiques professionnelles réelles ou supposées, le législateur a entendu éviter qu'une telle réutilisation permette, par des traitements de données à caractère personnel, de réaliser un profilage des professionnels de justice à partir des décisions rendues, pouvant conduire à des pressions ou des stratégies de choix de juridiction de nature à altérer le fonctionnement de la justice.*”

The Loïc Cadiet report (professor of law at the Sorbonne) of January 10, 2018 commissioned by the Ministry of Justice covers the subjects of open data, pseudonymization and anonymization in considerable detail, but it does not include a proposal to prohibit legal analytics. Available at: [http://www.justice.gouv.fr/publication/open\\_data\\_rapport.pdf](http://www.justice.gouv.fr/publication/open_data_rapport.pdf) [accessed April 14th 2020] and <http://www.justice.gouv.fr/publications-10047/rapports-thematiques-10049/remise-du-rapport-sur-lopen-data-des-decisions-de-justice-31165.html> [accessed April 14th 2020].

<sup>22</sup> Before the Parliamentary Law Commission the bill and in particular amendment No. 1425 were briefly discussed as follows (<http://www.assemblee-nationale.fr/15/cr/2018-2019/20190076.asp#P1530454>) [accessed April 14th 2020]:

Mr. Jean-Michel Mis (MP): Articles L. 10-1 of the code of administrative justice and L. 111-13 of the code of judicial organization in their version resulting from the work of the law commission, provide that in matters of open data of court decisions, the elements making it possible to identify magistrates and civil servants of the registry will not, in principle, be concealed.

The inherent transparency in open data cannot, however, lead to the re-use of the identity data of magistrates and court officials, in particular profiling or classification techniques – or ranking - having the purpose or effect of evaluating, analyzing, comparing or predicting their professional practices, real or supposed. The purpose of this amendment is therefore to prohibit, within the framework of open data of court decisions, any form of re-use of the identity of judges and court officials which may lead to this type of practice. Mme Laetitia Avia (MP), rapporteure: This is the last step in this mechanism of

Why is this?

There are several explanations.

### **a) The judge as an institution**

Judges are deemed to represent the “judicial institution” as such and not act in their own name, even though their names do appear in judgments (unless redacted for the reasons explained above). Judgments are rendered in “the Name of the French People” (“*au nom du peuple français*”).

An example of how this philosophy translates into concrete differences compared to a common law tradition is that French judgments do not contain dissenting opinions. Dissent may be expressed in pre-judgment deliberations (secret), but neither the dissenting opinion nor the fact that there was dissent will appear in the judgment.

The personality of the judge is institutionalized.

In addition the role of the judge under French procedural tradition extends far beyond deciding disputes. The judge is also in charge of investigating crimes.

Acting as a “juge d’instruction” (examining magistrate) the judge is mandated to investigate cases in the interest of “uncovering the truth” (“*en*

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transparency and data protection on open data of court decisions, which we made in committee. We have had rich debates over obtaining data transparency by protecting it with security and privacy. We also wanted to counter the risk of re-using data on magistrates, aimed at profiling them to know their way of judging, because this is not our conception of justice. I therefore congratulate the group La République en Marche and our colleague Paula Forteza, who has worked extensively on this subject, for having reached this last level of protection in the open data of court decisions. I therefore express an extremely favorable opinion on the adoption of this amendment. M. le président. What is the opinion of the Government? Mme Nicole Belloubet (Minister of Justice): Also of a very favorable opinion. Open data of court decisions improves knowledge of the case law, which is why we wanted it to appear in the text of the law. To be extremely schematic, we started from the idea that for open data to develop in a positive way, anonymization had to be erected in principle for the parties and third parties, but that, on the other hand, transparency had to be the rule for legal actors. However, the text places limits on this principle of transparency, which stem from security considerations, in particular in the area of terrorism, and respect of privacy. We also consider that the ranking or the forum shopping present a real danger, because they could lead to choose such or such jurisdiction after having analyzed the degree of severity of the decisions of each court. To defuse this risk, the proposed amendment is extremely useful. We want to have a great knowledge of the jurisprudence, but without comparison, classification or analysis of the jurisdictions compared to the others. Very favorable opinion on this amendment. M. Sébastien Huyghe (MP in opposition) : I oppose this amendment because it obscures a problem rather than resolves it. What is the problem in our justice system? Depending on the jurisdiction and the judge who decide a case, the judgment and the scale of the sentence vary. At the initiative of the bar of Lille, a predictive justice tool has been put in place. Rather than hiding this unsatisfactory situation, it should be used to try to improve things and harmonize decisions between courts and judges. With this amendment, I have the impression that we are putting dust under the carpet, instead of tackling the problem of variously harsh judgments according to the jurisdictions and the magistrates who render them. (Amendment No. 1425 is adopted.)

*vue de la manifestation de la vérité*”). The judge is under a legal obligation to conduct investigations objectively and uncover facts both in support of guilt and innocence (“à charge et à décharge”).

In addition to these investigative steps the “juge d’instruction” also decides whether the suspect should be indicted.

This is the essence of the French “Inquisitorial System”.

With such broad prerogatives and functions one may actually argue that it is precisely because of these inquisitorial powers that profiling may not only be legitimate, but also necessary in order to ensure compliance with the objectivity obligation.

As we have seen this was however not the case: The lawmaker decided that it was necessary to prohibit profiling arguing that influencing and “gaming the system” could have both trial and pre-trial consequences.

## **b) On Forum shopping**

### ***The Natural Judge***

France does not employ a system of “natural judges” (i.e. a judge designated by a lottery or equivalent system).

Cases and resource assignments are decided by the President of the court typically for the coming year.

Several countries have excluded the authority of any individual to designate a judge.

Germany, Austria, Italy and Portugal have even included the natural judge as a constitutional right.<sup>23</sup>

In the US, different variations of lottery systems are used: Calendar systems, random blind assignment, master or independent calendar systems and randomized computer assignment.<sup>24</sup>

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<sup>23</sup> Bado, Attila and Guémar, Carine, Le dispositif de distribution automatique des dossiers garanti moderne de l’indépendance des juges, *Revue internationale de droit comparé* (2016), pp. 573-588, spe. pp. 580-584. Available at: [https://www.persee.fr/doc/ride\\_0035-3337\\_2015\\_num\\_67\\_2\\_20516#ride\\_0035-3337\\_2015\\_num\\_67\\_2\\_T14\\_0584\\_0000](https://www.persee.fr/doc/ride_0035-3337_2015_num_67_2_20516#ride_0035-3337_2015_num_67_2_T14_0584_0000) [accessed April 14th 2020].

<sup>24</sup> The US lottery system is summarized on the official website [uscourts.gov](http://uscourts.gov) as follows: Judge assignment methods vary. The basic considerations in making assignments are to assure equitable distribution of caseloads and avoid judge shopping. By statute, the chief judge of each district court has the responsibility to enforce the court's rules and orders on case assignments. Each court has a written plan or system for assigning cases. The majority of courts use some variation of a random drawing. One simple method is to rotate the names of available judges. At times judges having special expertise can be assigned cases by type, such as complex criminal cases, asbestos-related cases, or prisoner cases. The benefit of this system is that it takes advantage of the expertise developed by judges in certain areas.

It could be argued that replacing the current system by a lottery-based formula would be an effective solution to the perceived risk of “judge shopping”.

There may be smaller court houses where the calendar system may allow the parties to at least attempt to have a case admitted before a specific judge rather than another, but first of all it seems disproportionate to enact a general prohibition because of an exceptional risk and secondly, not even in those smaller jurisdictions is it certain that a given judge may actually preside in a given chamber on the calendar date indicated.

### ***Jurisdiction***

Jurisdiction is strictly regulated by the Codes of Civil and Criminal Procedure.<sup>25</sup>

In civil matters, both member state and European Union law designate the defendant’s domicile (personal jurisdiction) as the primary jurisdiction.

This is also the principle in France ref. article 42(1) of the Code of Civil Procedure “*the court with territorial jurisdiction shall, unless otherwise provided, be that of the place where the defendant resides*”).

The principle is not without exceptions. For example in matters relating to real property in rem jurisdiction applies (article 44 of the Code of Civil Procedure).

The plaintiff may also choose one of the following alternatives (non exhaustive):

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Sometimes cases may be assigned based on geographical considerations. For example, in a large geographical area it may be best to assign a case to a judge located at the site where the case was filed. Courts also have a system to check if there is any conflict that would make it improper for a judge to preside over a particular case. Available at: <https://www.uscourts.gov/faqs-filing-case> [accessed April 14th 2020].

<sup>25</sup> Excerpt of Article 42 of the Code of civil Procedure: “La juridiction territorialement compétente est, sauf disposition contraire, celle du lieu où demeure le défendeur ». Article 46 of the Code of Civil Procedure: « Le demandeur peut saisir à son choix, outre la juridiction du lieu où demeure le défendeur : - en matière contractuelle, la juridiction du lieu de la livraison effective de la chose ou du lieu de l’exécution de la prestation de service ; - en matière délictuelle, la juridiction du lieu du fait dommageable ou celle dans le ressort de laquelle le dommage a été subi ; - en matière mixte, la juridiction du lieu où est situé l’immeuble ; - en matière d’aliments ou de contribution aux charges du mariage, la juridiction du lieu où demeure le créancier..”

- in matters relating to contract, the jurisdiction of the place of actual delivery of the goods or performance of the service;
- in matters relating to tort, the court of the place of the harmful event or the court where the damage was sustained (article 46).

In criminal matters, the court where the offense was committed has jurisdiction (as a general rule).

As mentioned above French criminal procedure is based on the inquisitorial model i.e. the designation of an “examining magistrate” (“juge d’instruction”) who is in charge of the investigation and instructs the police to conduct such investigations. Under extremely limited conditions is it possible to remove an examining magistrate from a case.

Notwithstanding the exceptional nature of such removal, concern has been expressed that the “*repeated use of this option is likely to hamper the proper conduct of investigations, to pose a permanent threat to examining magistrates and criminal courts and to undermine the independence of the judiciary*” and that such decisions lead to “*a delay of several months of the investigations, which is necessarily prejudicial to the establishment of the truth*”.<sup>26</sup>

It could be argued that in the event profiling may raise serious doubt as to a judge’s competence, bias or particular penchant towards harsh or lenient decisions which would not favor egalitarian justice then the fact that maybe another judge should be appointed is in the interest of justice and *the establishment of the truth* rather than the opposite.

It may also be argued that profiling would allow such information to be available upon designation of the judge and that consequently the investigations would not need to be resumed and delays not encountered.

Whatever the views on these questions as it will be seen, choice of jurisdiction is limited and far from the almost arbitrary forum shopping liberty presupposed by this argument against legal analytics.

### **c) On Disciplinary and Penal Oversight**

Another argument raised in favor of the law is that judges are already subject to disciplinary and even penal oversight so that additional checks and balances are not necessary and in particular that profiling is not required for the purpose of attaining “*egalitarian and predictive justice*”.

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<sup>26</sup> “Carlton : les magistrats inquiets” *Le Figaro* [online]. Available at: <https://www.lefigaro.fr/flash-actu/2011/10/26/97001-20111026FILWWW00525-carlton-les-magistrats-inquiets.php> [accessed April 14th 2020].

The existing oversight provisions may be summarized as follows:

Judges do not enjoy immunity from penal responsibility. As such, they are subject to the Penal Code in general and in particular to abuse of power (art. 432-4), active or passive corruption (art. 434-9) and denial of justice (art. 434-7-1).

Civil liability is replaced by direct state liability.<sup>27</sup>

Disciplinary sanctions range from reprimands to compulsory retirement without or without pension rights.<sup>28</sup>

The CSM (Supreme Council of the Judiciary) acts as the disciplinary board under the chairmanship of the President of the Supreme Court (“*Cour de Cassation*”).

Disciplinary sanctions are published on the Council’s website, but names are redacted.<sup>29</sup>

There is consensus that the system works, but might it not work even better if the Council had at its disposal profiles?

#### **d) On Invasion of Privacy**

This conflict between open government and privacy is addressed by the GDPR in recital 154 and Article 86.

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<sup>27</sup> Article 11-1 of the *Statutory Order* of 22 December 1958 that *Judges (...) are only liable for their personal misconduct. The liability of judges who have committed a personal fault relating to the public service of justice can only be engaged by way of an action against the State (...)*

“Les magistrats du corps judiciaire ne sont responsables que de leurs fautes personnelles. La responsabilité des magistrats qui ont commis une faute personnelle se rattachant au service public de la justice ne peut être engagée que sur l'action récursoire de l'Etat. Cette action récursoire est exercée devant une chambre civile de la Cour de cassation.”

<sup>28</sup> The normal age of retirement is 67 (for Presidents of the court and the general prosecutor at the Cour de cassation it is 68). Article 76 of the *Statutory Order* of 22 December 1958 as modified by the law no. 2010-1341 of 10 November 2010: “*Sous réserve des reculs de limite d'âge pouvant résulter des textes applicables à l'ensemble des agents de l'Etat, la limite d'âge pour les magistrats de l'ordre judiciaire est fixée à soixante-sept ans.*

*Toutefois, est fixée à soixante-huit ans la limite d'âge des magistrats occupant les fonctions de premier président et de procureur général de la Cour de cassation.*”

<sup>29</sup> The CSM Report for 2018. Available at: <http://www.conseil-superieur-magistrature.fr/actualites/rapport-dactivite-2018-du-csm>. [accessed April 14th 2020].

Recital (154):

*This Regulation allows the principle of public access to official documents to be taken into account when applying this Regulation. Public access to official documents may be considered to be in the public interest. Personal data in documents held by a public authority or a public body should be able to be publicly disclosed by that authority or body if the disclosure is provided for by Union or Member State law to which the public authority or public body is subject. Such laws should reconcile public access to official documents and the reuse of public sector information with the right to the protection of personal data and may therefore provide for the necessary reconciliation with the right to the protection of personal data pursuant to this Regulation. The reference to public authorities and bodies should in that context include all authorities or other bodies covered by Member State law on public access to documents. Directive 2003/98/EC of the European Parliament and of the Council (1) leaves intact and in no way affects the level of protection of natural persons with regard to the processing of personal data under the provisions of Union and Member State law, and in particular does not alter the obligations and rights set out in this Regulation. In particular, that Directive should not apply to documents to which access is excluded or restricted by virtue of the access regimes on the grounds of protection of personal data, and parts of documents accessible by virtue of those regimes which contain personal data the re-use of which has been provided for by law as being incompatible with the law concerning the protection of natural persons with regard to the processing of personal data.*

Article 86 - Processing and public access to official documents

*Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation.*

As it can be seen open government overrides the GDPR unless it conflicts with *the right to the protection of personal data*. In other words it is the individual's rights that are protected and not for instance "the justice system".

The combination of open government priority and the absence of a profiling prohibition in the GDPR seem to counter the privacy argument.



## e) On Human Rights

### *Free speech and freedom of information*

The ECHR enshrines transparency and freedom of information as the mirror of free speech (Article 10).<sup>30</sup>

Does a prohibition against profiling violate the right to information?

Judges enjoy specific protection under the ECHR and the EUCJ, but this protection is not personal. It is meant as a protection of the independence of the judiciary as such.

The recent case *Commission v. Poland* (C-791/19R) of 8 April 2020 is a good example of such protection.<sup>31</sup>

In the words of the press release issued by the EUCJ:

*Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges.*

*The pleas of fact and of law put forward by the Commission justify the grant of interim measures.*

*In 2017, Poland adopted the new disciplinary regime for judges of the Sąd Najwyższy (Supreme Court, Poland) and the ordinary courts. Specifically, under that legislative reform, a new Chamber, the Izba Dyscyplinarna (the Disciplinary Chamber) was created within the Sąd Najwyższy. The jurisdiction of the Izba Dyscyplinarna thus covers, inter alia, disciplinary cases concerning judges of the Sąd Najwyższy and, on appeal, those concerning judges of the ordinary courts.*

*Taking the view that, by adopting the new disciplinary regime for judges, Poland had failed to fulfill its obligations under EU law, on 25 October 2019 the Commission brought an action before the Court of Justice. The Commission claims, inter alia, that the new disciplinary regime does not guarantee the independence and impartiality of the Izba Dyscyplinarna, composed exclusively of judges selected by the Krajowa Rada Sądownictwa (the National Council of the Judiciary; ‘the KRS’), the fifteen judges who are*

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<sup>30</sup> Article 10 of the ECHR on freedom of expression explicitly states that this right includes “...freedom to receive information.. “ *The ECHR already decided in the case Leander v. Sweden* (9248/81 of 26 March 1987) that “...the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him....” [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57519 »\]}](https://hudoc.echr.coe.int/eng#{). This does not entail an unlimited right to access information. In the recent judgment of the ECHR in the case *Studio Monitori et al. v. Georgia* (44920/09 and 8942/10 of 20 January 2020) certain information in public records may be denied (unmotivated request to access criminal records not in the public interest). [https://hudoc.echr.coe.int/eng#{"itemid":\["001-200435 »\]}](https://hudoc.echr.coe.int/eng#{)

<sup>31</sup> ECJ, Order of the Court (Grand Chamber) of 8 April 2020, *European Commission v Republic of Poland*, Case C-791/19.

*members of which were elected by the Sejm (the lower chamber of the Polish Parliament).*

General defamation protection of judges does not violate the ECHR (it is unclear whether enhanced defamation protection would constitute a violation of Article 10).

In the ECHR case no. 39294/09 of 30 June 2015, the Court upheld a lawyer's conviction for defamation of a judge.<sup>32</sup>

The case concerned the criminal conviction of Mr. Peruzzi, a lawyer, for having defamed an investigating judge in the context of civil proceedings (in a circular letter sent to the judge and his colleagues).

The Court considered that Mr. Peruzzi's conviction could reasonably be considered "necessary in a democratic society" in order to protect the reputation of others and maintain the authority and *impartiality of the judiciary*.

Thus, the Court held that the conviction was justified and did not infringe freedom of speech. It could however be inferred that a degree of enhanced protection applies over and above the personal reputation of the judge (in order to protect "*the judiciary*" as an institution).

On the other hand a recent judgment (Tête v. France Judgment of 26 March 2020 (n° 59636/16)) from the ECtHR drew the line between defamation (calumny, false allegations) and free speech and confirmed the primacy of speech.<sup>33</sup>

The ECHR decided that - in the interest of a democratic society - any restriction of free speech must be necessary.

In the case at hand the Paris Court of appeal had confirmed a conviction against a local politician who had alerted the authorities to alleged wrongdoing on the part of a company engaged in a major local building project.

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<sup>32</sup> ECHR, Judgment, case of Peruzzi v. Italy, 30 June 2015, case 39294/09. Available at: <http://hudoc.echr.coe.int/eng?i=001-155974>. [Accessed April 14<sup>th</sup> 2020].

<sup>33</sup> ECHR judgment, case Tête v. France 26 March 2020, case (59636/16). Available at: [https://www.droit-technologie.org/wp-content/uploads/2020/03/AFFAIRE-T\\_TE-c.-FRANCE.pdf](https://www.droit-technologie.org/wp-content/uploads/2020/03/AFFAIRE-T_TE-c.-FRANCE.pdf) [Accessed April 14<sup>th</sup> 2020].

He was fined 3000 € for calumny.

The ECtHR decided that the Paris Court decision violated Article 10 since the matter was of public interest and the right to privacy and protection of reputation did not outweigh the right to free expression under the specific circumstances of the case.

The ECtHR placed particular emphasis on the fact there is no stronger restriction of free speech than penal sanctions.

One may argue that the profile of a judge is by definition of public interest, that it is not inherently defamatory (neither against a normal nor an enhanced defamation test) and that the penal prohibition against performing and sharing such profiles constitutes a violation of article 10.

In this sense profiling may be a human right comparable to investigative journalism.

### ***Due Process/Equality of arms***

Due process and the right to a fair trial is generally accepted to include the principle of “equality of arms”.<sup>34</sup>

This principle applies both in civil and in criminal procedures and is enshrined in several human rights instruments.<sup>35</sup>

If profiling is illegal it may be questioned whether it violates due process since the findings (notwithstanding their relevance) are not allowed in defense.

Given the overwhelming asymmetry confronting the accused or civil party facing a judge - the most powerful individual in the universe at that moment in time - it seems that equality of arms is not simply a case of equality between the parties.

The true confrontation may be against the bias (personal or general) of the judge and there is little if any equality in that regard.

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<sup>34</sup> See Negri, Stefania, Equality or Arms - Guiding Light or Empty Shell?, *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, ed. Bohlander, Michael, 1 905017 44 8, Cameron May Ltd., pp 13. Available at: [https://www.researchgate.net/publication/271583549\\_Equality\\_of\\_Arms\\_Guiding\\_Light\\_or\\_Empty\\_Shell](https://www.researchgate.net/publication/271583549_Equality_of_Arms_Guiding_Light_or_Empty_Shell) [accessed April 14th 2020].

<sup>35</sup> Article 14 of the ICCPR of 16 December 1966; Article 6 of the ECHR of 4 November 1950; Article 8 of the American Convention on Human Rights of 22 November 1969, Article 7 of the African Charter on Human and Peoples' Rights of 27 June 1981; Article 47 of the Charter of Fundamental Rights of the European Union of 2 October 2000; Rule 7.1 of the United Nations Standard Minimum rules for the Administration of Juvenile Justice of 29 November 1985.

Having access to profiling data may balance the power structure.

### **f) On Extraterritoriality**

The law does not address the problem of profiling sites operating legally in other countries and the use in France of profiling data obtained from such sources by lawyers and /or media. This question received little attention during the legislative debate (for profiling sites established in other EU member states see below under g)).

The wording of the law seems to open up for prosecution in such cases (alternatively on the basis of fencing), but since the law has not entered into effect we have no case law yet.

### **g) On Compatibility with EU law**

The law may be incompatible with European Union guarantees on free movement of data and services as well as the country of origin principle pronounced in the e-commerce directive on the “Internal Market”.<sup>36</sup>

The internal market clause is one of the key principles of the e-commerce directive. It establishes the country of origin principle, which ensures the freedom to provide online services across the Single Market.

Online service providers are subject to the laws of their Member State as opposed to the laws of Member States where the service is accessible. The country of destination cannot restrict such services if compliant with the country of origin’s legislation.

Derogations are strictly limited to: *Protection of public order, public health, public security or the protection of consumers* and the derogation must be *proportionate to the objective*.

*In addition the Member State in question must first contact the authorities of the other Member State and ask them to act. If that brings no result, it has to notify the Commission and the other Member State of the action it intends to take. The Commission then has the right to receive information and assess*

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<sup>36</sup> DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce, Article 3 Internal market 1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.)

*the justification of the measure. If it is found that the action is incompatible with EU law, the concerned Member State shall refrain from action.*

As far as I have been able to determine the French government has not contacted any other Member States or notified the Commission of its intention to restrict legal analytics services.

Applying penal sanctions to the local use of such services as opposed to their publication in a member state may amount to circumvention.

The country of origin principle is fundamental to the European Union and to its efforts to build a single digital market. The recent Audiovisual Media Services Directive (“AVMSD”) has even reinforced it (derogations are limited to public security concerns and serious risks to public health).<sup>37</sup>

These principles will most likely be reinforced in the Digital Services Act currently under elaboration the express objective of which is to accelerate the creation of a true single digital market in the EU.<sup>38</sup>

## **h) On Derogations from the GDPR**

The GDPR is a regulation (not a directive) and as such applies directly all over the EU and in a uniform fashion.

The intention is for business and users alike throughout the EU to abide by the same rules. Therefore the authorized exceptions are very limited and should be interpreted as exhaustive.

Article 23 of the GDPR allows Member States to introduce derogations for reasons of national security, public security, the protection of judicial independence and proceedings and the enforcement of civil law matters.

Derogations must respect the right to data protection and be a necessary and proportionate measure.

Under these conditions it is far from clear whether the protection of judicial independence and proceedings allow a blanket prohibition against profiling of judges (as mentioned above profiling is not illegal under the GDPR).

## **i) The slippery slope theory**

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<sup>37</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. Available at: <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>. [Accessed April 14th 2020].

<sup>38</sup> On the Digital Services Act. Available at: <https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce> [accessed April 14th 2020].

If profiling of judges is prohibited what would stop the same from happening for police officers, civil servants, prosecutors, etc.?

The law does not prohibit - for the moment - profiling of case officers for instance reviewing immigration requests or building permits or any other request presented before an administrative authority, which has the power to grant or reject the request.

Citizens are increasingly faced with decisions of an administrative nature having massive impacts on their life.

Should they be barred from revealing bias and arbitrariness in consideration of the undisturbed functioning of the administration?

## **Conclusion**

Oliver Wendell Holmes famously stated that: “*The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law*”.<sup>39</sup>

Law is merely a prediction.

If we subscribe to this theory we must necessarily conclude that predictability is foundational to the “Rule of Law” (actually predictability and “legal certainty” are essential to all legal theories).

The power of judges is not only to define and create law. It is also the power to decide your destiny. When you are in the thrall of a judge you realize that you are at the mercy of the most powerful person in your life.

You have little real recourse.

There is no balance - no level playing field. No equality.

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<sup>39</sup> Holmes, Oliver Wendell Jr. (1897). *The Path of the Law*, 10 Harvard Law Review 460-61. The principles of predictability and “judicial positivism” are not unchallenged. As examples the theories of Natural Law and Regulatory Law should be mentioned. Yet these theories do not contradict the importance of objectivity and predictability (as an example see The World Justice Project on the Rule of Law, Available at: <https://worldjusticeproject.org/about-us/overview/what-rule-law>) [accessed April 14th 2020].

Even Napoleon notoriously claimed that the examining magistrate (“juge d’instruction”) is the most powerful man in France<sup>40</sup> and Balzac writes in his novel *Splendeurs et misères des courtisanes*, that “no human power, neither the king, nor the minister of justice or the Prime Minister can limit the power of the Juge d’instruction, nothing stops him and nothing commands him”.<sup>41</sup>

One would have imagined that precisely because of the vast powers vested in the judge, any checks on balances would be justified and in particular under an inquisitorial system.

Legal analytics serve a dual or maybe a triple purpose. They help achieve: Predictive and egalitarian justice. They allow for checks and balances and finally they may even help the judge understand his/her own subjectivity, predilections or bias.

Why should any technology, which could help achieve any of these objectives, be banned?

There should be no limit to checks and balances. They should be encouraged rather than prohibited.

The importance of the personality of the judge has been recognized long-since by social and cognitive psychology.

Do we find it acceptable if a judge in a family court has personal religious or moral convictions, which could influence his/her application of the law or a racially biased judge in criminal court or a particularly liberal or conservative attitude of a judge towards drug crimes or political/ideological leanings in civil or commercial matters? Of course not.

To the extent the French ban is justified by the presidential case assignment system maybe it would have been preferable to take inspiration from

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<sup>40</sup> “L’homme le plus puissant de France ». There is some doubt whether Napoleon actually made that statement or whether it was “Balzac” (see note 41).

<sup>41</sup> Balzac, H.(1847) *Splendeurs et misères des courtisanes* [online] Available at: <https://beq.ebooksgratuits.com/balzac/Balzac-50.pdf> p. 627 [accessed on April 14th 2020] “Aucune puissance humaine, ni le Roi, ni le garde des Sceaux, ni le Premier ministre ne peuvent empiéter sur le pouvoir d’un juge d’instruction, rien ne l’arrête, rien ne lui commande. C’est un souverain soumis uniquement à sa conscience et à la loi. En ce moment où philosophes, philanthropes et publicistes sont incessamment occupés à diminuer tous les pouvoirs sociaux, le droit conféré par nos lois aux juges d’instruction est devenu l’objet d’attaques d’autant plus terribles qu’elles sont presque justifiées par ce droit, qui, disons-le, est exorbitant”.

the lottery systems and thereby avoid the pressure believed to be exercised (or be exercisable) on the judiciary rather than ban what seems inevitable (i.e. technology).

It seems that the notion of equality in the famous motto from the French revolution and the Declaration of the Rights of Man and of the Citizen “*liberté, égalité, fraternité*” is incompatible with the ban since legal analytics reinforce equality in so far as it increases the likelihood that the same facts will be judged the same way irrespective of the personal convictions, bias and competence of the judge (and the resources made available to law firms whose fees are not within reach of most people).

In spite of the above questions, challenges and concerns the law passed the National Assembly, the Senate and the Constitutional Council as we have seen.

Maybe judging is the human condition: Michel Foucault, “*It’s crazy how people love judging. They judge all the time. It is no doubt one of the easiest things given to do ever given to humanity*”<sup>42</sup>, but it is precisely for this reason that subjectivity must be eliminated to the fullest extent possible and in the famous words of Jeremy Bentham there is no better remedy than transparency: “*Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial. In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice*”<sup>43</sup>

Subjectivity is inimicable to the very notion of justice.

With the advent of more and more powerful prediction technology and its impact on democracy we must carefully weigh the pros and cons and engage in an open and comprehensive debate on the use of technology in the judiciary.

Several countries for instance Estonia and China have already introduced AI in judicial decision-making<sup>44</sup> and these technologies may be seen as

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<sup>42</sup> “*C’est fou ce que les gens aiment juger. Ca juge partout, tout le temps. Sans doute est-ce l’une des choses les plus simples qui soient données à l’humanité de faire.*” “*Le philosophe masque*” entretien avec C. Delacampagne, février 1980, *Le Monde*, n° 10945 (April 6, 1980), *Its et Ecris*, tome IV, Coll. “*Quatro*” Gallimard, texte n° 285.

<sup>43</sup> J. Bentham, DRAUGHT FOR THE ORGANIZATION OF JUDICIAL ESTABLISHMENTS, COMPARED WITH THAT OF THE NATIONAL ASSEMBLY, WITH A COMMENTARY ON THE SAME., *The Works of Jeremy Bentham*, vol. 4 (Panopticon, Constitution, Colonies, Codification), William Tait [1843].

<sup>44</sup> Estonia <https://www.loc.gov/law/foreign-news/article/estonia-government-issues-artificial-intelligence-report/> [accessed April 14th 2020] and China <https://thediplomat.com/2019/01/why-are-chinese-courts-turning-to-ai/> [accessed April 14th 2020].



enhancing both quality judgments and legal certainty - values that we all subscribe to.

Technology may even strengthen the protection of the presumption of innocence (which is constantly infringed on social media).<sup>45</sup>

Whatever our opinion on AI and justice there is a big difference between profiling and decision making. Profiling does not intend to replace the judge. AI may.

The French initiative may be misguided, but at least it is an attempt to address the challenges and opportunities and offers deep insight, reflection and analysis on the subject.

The real challenge is this: What sort of justice system do we want for the 21st century and how can modern technology become an integral part of that system? Profiling and predictive technology are just a part - albeit an important part - of this much larger conversation.

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<sup>45</sup> In recognition of these vital challenges the Stockholm Program (on the "Procedural Rights Roadmap") led to the adoption of Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. The thrust of this directive is public references to guilt (in other words "vertical violations of the presumption of innocence"): "1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence."