

France

Laurent Dolibeau, CMG LEGAL Avocats, Paris

Paraskevi Georganta, CMG LEGAL Avocats, Paris

1. What is the understanding or definition of AI in your jurisdiction?

The definitions of artificial intelligence (AI) proposed within the French legal landscape always refer to human intelligence. The French Data Protection Authority (Commission nationale de l'informatique et des libertés or CNIL) defined AI as 'the science of making machines do what man would do with a certain intelligence'.¹⁴⁹ In a 2017 annual study, the French Conseil d'Etat defined AI as 'the science whose aim is to make a machine perform tasks that traditionally require human or animal intelligence'.¹⁵⁰ In a report on the open data of court decisions submitted to the Minister of Justice in 2017, AI is defined as 'the set of theories and techniques whose purpose is to make a machine that simulates human intelligence perform tasks'.¹⁵¹

The Commission d'enrichissement de la langue française, whose primary purpose is to fill gaps in vocabulary and to designate in French the concepts and realities that appear under foreign names, defined AI as the 'theoretical and practical interdisciplinary field whose purpose is the understanding of mechanisms of cognition and reflection, and their imitation by a hardware and software device, for the purpose of assisting or substituting human activities'.¹⁵² The definitions of this commission are published in the Official Journal of the French Republic, and are then of obligatory use in the administrations and institutions of the state and serve as a reference.

However, any comparison between AI and human intelligence, which is a purely anthropocentric approach, seems completely misleading. AI will never be human! On the contrary, some authors point out the risk of AI becoming inhumane, controlling our civil liberties. The questions raised by the relationship between AI and humans, its ability to capture our emotions, anticipate or direct our desires,

149 Translated from the definition in French: '*la science qui consiste à faire faire aux machines ce que l'homme ferait moyennant une certaine intelligence*'; CNIL, *How can humans keep the upper hand? Report on the ethical matters raised by algorithms and artificial intelligence* (2017).

150 Translated from the definition in French: '*science dont le but est de faire accomplir par une machine des tâches qui requièrent traditionnellement l'intelligence humaine ou animale*'; Conseil d'Etat Annual Study (2017).

151 Translated from the definition in French: '*l'ensemble des théories et techniques dont le but est de faire accomplir des tâches par une machine qui simule l'intelligence humaine*'; Report on the open data of court decisions submitted to the Minister of Justice in 2017.

152 Translated from the definition in French: '*champ interdisciplinaire théorique et pratique qui a pour objet la compréhension de mécanismes de la cognition et de la réflexion, et leur imitation par un dispositif matériel et logiciel, à des fins d'assistance ou de substitution à des activités humaines*'; published in the Official Journal of the French Republic.

or decipher parts of our personality or health, raise a growing body of ethical questions, from its autonomy to its status or the establishment of responsibility.

As many digital professionals point out, the term AI was first built – and still is today – on a marketing approach in order to designate the most advanced and ever-changing area of information processing techniques.¹⁵³ Some experts even denounce the confusing term, which relates less to a form of real intelligence than to fast, evolved or advanced algorithms.¹⁵⁴

Moreover, we must bear in mind that the technologies used by AI in the legal sector are mainly expert systems that can be summarised as ‘first AI generation’ (eg, contract management software).

The current interest for AI is renewed by the emergence of two technologies: machine learning and natural language processing, which are currently under-used or too disappointing in their application to law, especially among French legal tech.

AI must therefore be understood within a technological ecosystem that feeds on data exploitable by high-performance algorithms, outside of any fantasy or anthropocentric perspective generated by certain propaganda of innovation.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

Legal professionals are beginning to adopt AI tools in their practice, mostly for the execution of repetitive and time-consuming tasks.

The interest in AI increased when, in 2017, IBM launched ROSS, AI software capable of researching case law and faster than an associate lawyer. Currently, the American law firm, Latham & Watkins based in Paris, is in a testing phase with ROSS, to be followed by smaller structures.

But ROSS’s great popularity should not be confused with the reality of its performance, which remains limited today for at least three sets of reasons:¹⁵⁵

- ROSS is not a finished product: currently, it only specialises in United States bankruptcy law and US intellectual property law, which limits its use under French law;
- reversals in decisions, particularly from the French Court of Cassation, will remain difficult to anticipate for an algorithm based on backward-looking data; and

153 See <https://pierrelevyblog.com/2018/09/06/lintelligence-artificielle-va-t-elle-prendre-le-pouvoir> accessed 6 July 2020.

154 See www.lemonde.fr/idees/article/2019/11/24/l-intelligence-artificielle-est-bien-aujourd-hui-une-escroquerie_6020312_3232.html accessed 6 July 2020.

155 Emmanuel Barthe, *L’intelligence artificielle et le Droit*, see www.cairn.info/revue-i2d-information-donnees-et-documents-2017-2-page-23.htm accessed 6 July 2020.

- the implementation period in French law is about seven years due to the development and availability of usable court decisions.

More specifically, AI in law is characterised by the combined use of Big Data, machine learning, probability calculations, natural language processing and expert systems (formalisation of the expertise of specialists, notably through hierarchical trees). In French law, apart from ROSS, only a limited number of applications meet this AI qualification.¹⁵⁶

The first area in which the greatest progress in legal AI has been made is contract and clause review. Softlaw specialises in the audit of contracts for M&A in order to detect questionable clauses.

Hyperlex developed an online contract management and analysis solution that allows its clients to classify their contracts, and find specific clauses or specific data (dates and amounts) with an automatic alert system. The company has the particularity of using all available AI technologies, including image pattern recognition, and intervenes with the Paris Chamber of Notaries to automatically tag notarial documents.¹⁵⁷

Still in the field of document analysis, the bank JP Morgan launched Contract Intelligence ('COIN') in 2017, a bot that is able to review complex legal contracts faster and more efficiently than lawyers. According to the bank, since its launch, the bot has helped save more than 360,000 man-hours. Société Générale is developing a scoring engine to detect customers likely to leave the bank. According to Société Générale, it has quadrupled the number of detected customers likely to leave since its launch.

In the field of predictive justice, Predictice and Case Law Analytics are decision support tools for legal professionals and insurers. They provide access to case law via a natural language search engine. An algorithm then calculates the probabilities of resolving a lawsuit, the amount of potential compensation and identifies the most influential legal arguments or facts in previous decisions handed down by the courts.

RegMind uses AI to provide automatic regulatory monitoring and follow-up in banking and financial law.

Many other legal techs exist, but their degree of technological innovation does not enable them to enter the AI category. Examples include YouSign (electronic signature), Youstice (online dispute resolution) or AirHelp (compensation assistance in case of delayed or cancelled flights).

¹⁵⁶ Indeed, AI is limited in the legal sector by an undeniable obstacle, which is the lack of usable data. This issue will be addressed in question 4 below.

¹⁵⁷ See www.lemondedudroit.fr/professions/241-notaire/68509-victoria-intelligence-artificielle-notaires.html accessed 6 July 2020.

3. If yes, are these AI tools different regarding

- independent law firms;
 - international law firms; and
 - in-house counsel;
- and what are these differences?**

There are a large number of software packages claiming to develop AI, but few of them are actually based on the latest machine learning and natural language technologies.

There should be no difference in the use of these tools and software by these different structures, except that international law firms are more likely to use them because of their larger resources and the level of implementation of these tools in the US.

4. What is the current or planned regulatory approach on AI in general?

In March 2018, the French President presented his vision and strategy¹⁵⁸ to make France a leader in the field of AI. As a result, the Villani report titled *AI for Humanity*,¹⁵⁹ intended to lay the foundations of an ambitious French strategy, which has truly been the stimulus for a national discussion on the impact of AI, including the issue of the regulations that should be implemented.

A consensus seems to emerge from various reports and studies tending to conclude that, at this stage in the evolution of AI, there is no pressing need to rethink the current legislative and regulatory framework. Current legal mechanisms and regimes, coupled with contractual flexibility, currently enable economic actors and consumers to cope with technological change with a satisfactory level of legal safety.

However, there are exceptions to this approach, and special regulation may be necessary at a French and European level, for example, to support data openness, to regulate the activity of platforms or to accompany the development of specific innovation.

Autonomous vehicles that are currently in the testing phase are leading the government to support the development of testing in an open environment. The President announced in March 2018 that, by 2022, a regulatory framework allowing the circulation of autonomous vehicles will be put in place and that an exceptional legal framework on liability for intelligent objects will be necessary.¹⁶⁰

Moreover, the view that the development of AI should be regulated is widely shared because of its significant impact on the everyday life of citizens. The implementation of soft law measures should encourage the actors to respect the principles of

158 See www.elysee.fr/emmanuel-macron/2018/03/29/frances-new-national-strategy-for-artificial-intelligence-speech-of-emmanuel-macron.en accessed 6 July 2020.

159 See www.aiforhumanity.fr/en accessed 6 July 2020.

160 See n 26 above.

transparency and fairness of algorithmic processing. Indeed, AI technologies must be explainable if they are to be socially acceptable, and this is why their development cannot be carried out without certain ethical considerations.

At a national level, various reports and studies encourage the development of an initiative among AI stakeholders for the establishment of general guidelines in this area. The CNIL has thus issued a report following a public debate on the theme *Algorithms in the Age of AI*, which has made it possible to identify two founding principles for AI at the service of humans:

- the principle of fairness applied to all sorts of algorithms, and ensuring that the users' interests prevail in any case; and
- the principle of continued attention and vigilance in response to the unpredictable nature (inherent in machine learning) and the excessive reliance on technological objects.

These principles begin to take shape through six policy recommendations intended for both public authorities and civil society (companies, citizens, etc):¹⁶¹

1. fostering education of all players involved in algorithmic systems (designers, professionals and citizens);
2. making algorithmic systems comprehensible by strengthening existing rights and by rethinking mediation with users;
3. improving algorithmic system design at the service of freedom to prevent the 'black box' effect;
4. creating a national platform in order to audit algorithms;
5. increasing incentives for research on ethical AI and launching a major participative national cause around general interest research projects; and
6. strengthening ethics in companies (eg, by creating ethics committees, by spreading good practices in each sector or by revising code of ethics).

As another illustration of this desire to favour soft law for the time being, Etalab (a government body responsible for coordinating the open data policy for public data) has published a guide for administrations and public organisations that design, develop and operate algorithmic processing.¹⁶²

These guidelines set out four criteria that must be met for a decision based on an algorithm to be considered fair:

161 See www.cnil.fr/fr/comment-permettre-lhomme-de-garder-la-main-rapport-sur-les-enjeux-ethiques-des-algorithmes-et-de accessed 6 July 2020.

162 See <https://guides.etalab.gouv.fr/accueil.html> accessed 6 July 2020.

1. transparency;
2. intelligibility: the procedure must be described;
3. loyalty: the procedure described must actually be used completely and faithfully; and
4. equal treatment: no individual should be treated more favourably (or unfavourably).

The European Commission has undertaken to provide a framework for the development of AI across Europe in order to facilitate the development of a technology that is both efficient and respectful of European laws, principles and values. Therefore, the European Commission established a High-Level Expert Group that published guidelines on trustworthy AI in April 2019, in which seven key requirements were identified:¹⁶³

- human agency and oversight;
- technical robustness and safety;
- privacy and data governance;
- transparency;
- diversity, non-discrimination and fairness;
- societal and environmental wellbeing; and
- accountability.

These guidelines also contain an assessment list for practical use by companies. The High-Level Expert Group revised its guidelines in light of this feedback, and finalised this work in June 2020.

In February 2020, the European Commission launched the European Data Strategy, in which it published its White Paper 'On Artificial Intelligence – A European approach to excellence and trust'.¹⁶⁴ It states that a clear European regulatory framework would build trust in AI among consumers and business, and therefore speed up the uptake of the technology. The European Commission concluded that, in addition to possible adjustments to existing legislation, new legislation specifically on AI may be needed in order to make the European Union legal framework fit for current and anticipated technological and commercial developments.

¹⁶³ See https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419 accessed 6 July 2020.

¹⁶⁴ See https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf accessed 6 July 2020.

A genuine European AI ecosystem is thus taking shape, with the French strategy being in line from the outset with the strategy pursued on the scale of the European continent.

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

There are currently no specific regulations on the general use of AI or machine learning systems. However, current regulations apply in certain aspects to the use of AI.

First, Act No78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties, as well as the European Regulation No 2016/679, known as the General Data Protection Regulation (GDPR), apply to the use of AI in a general way insofar as it processes personal data.

Second, the French Data Protection Act formally controls algorithmic decisions by a principle of prohibition. It provides that no court decision or any decision of any kind producing legal effects in respect of a person or significantly affecting him or her may be taken on the basis of the automated processing of personal data intended to foresee or evaluate certain personal aspects relating to the data subject.¹⁶⁵ The GDPR also provides for the prohibition of automated individual decisions.¹⁶⁶

However, there are some fairly broad exceptions to this principle in French law. The Digital Republic Act No 2016-1321 of 7 October 2016 authorised the administration to make decisions regarding a person on the basis of an algorithm on the condition that it includes an explicit mention of the interested party information.¹⁶⁷ In addition, the source code of the algorithms used by the administration has been included among the documents that any citizen has the right to request access to.¹⁶⁸

Another exception exists in the area of intelligence agencies. Act No 2015-912 of 24 July 2015 allows the services concerned to use an algorithm aimed at detecting low signals of a terrorist threat by the massive processing of connection data without the need for personal identification.¹⁶⁹

6. Is free data access an issue in relation with AI?

As discussed above in question 2, the development of AI is limited in the area of law by the lack of openly usable data. The reason why AI could have a massive impact

¹⁶⁵ Article 120 of the Act No 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties.

¹⁶⁶ Article 22 of the GDPR.

¹⁶⁷ Article L.311-3-1 of the French code des relations entre le public et l'administration.

¹⁶⁸ Article L.300-2 of the French code des relations entre le public et l'administration.

¹⁶⁹ Article L.851-3 of the French code de la sécurité intérieure.

for lawyers is that no human can read millions of pages per second as AI can. No human can accumulate a memory equivalent to that of an AI. But the AI must have something to read or analyse, and it is not a condition easy to meet in France.

The first explanation is due to the French legal tradition concerning how court decisions are made. In fact, unlike their Anglo-Saxon counterparts and their dissenting opinions, French judges do not reflect in their decisions the debates and positions taken by each of the judges. The decisions of French judges, particularly those of the French Court of Cassation and the Conseil d'Etat, are thus shorter and sometimes only implicitly indicate the real motivations for the decision.

However, that limit may well be lifted in the future. The new methods of editing the decisions of the Constitutional Court, the Conseil d'Etat and, more recently, the French Court of Cassation now include an enriched motivation for the most important decisions (eg, reversal of jurisprudence), which includes the precedents, so the decision is placed in a common pattern. According to some authors, this could well allow algorithms to better read and analyse these decisions. Finally, French legal publishers who have the *doctrine* (the data that links court decisions together and allows them to be understood) do not yet include machine learning in their work. But they are working on it and will soon be able to provide additional data to the AI.

The second explanation for the lack of openly usable data is related to material limitations. First, the data must be available in a format that is usable for AI. However, many court decisions are not delivered in a format that the AI can read (paper format, poor quality scan, etc). Second, the conciliation of open data of court decisions with privacy requires these decisions to be anonymised. However, the justice system does not have sufficient human and technical means to anonymise thousands of court decisions.

In addition, a draft decree on making the decisions of judicial and administrative courts available to the public has been under discussion for three years. This text is the subject of a sharp debate, with many legal professionals denouncing a risk of exploitation and cross-referencing of sensitive personal data contained in court decisions with the resulting risk of forum shopping or lawyer shopping. A difficult balance must be found between the open data of court decisions, the requirement of anonymisation of sensitive data, and the human and technical means to achieve it.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

To the best of the authors' knowledge, no decision has been made to date regarding the use of AI.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

No regulations specific to the use of AI in services rendered by lawyers appear to be in place at this time. The discussion is at a more global level.

However, questions are being raised about the possibility of seeing robots one day handing down court decisions. This particularly concerns alternative dispute resolution methods that have recently been deployed in electronic form because – once online – the resolution method could be based on self-learning algorithms that could gradually result in a form of artificial justice.

9. What is the role of the national bar organisations or other official professional institutions?

The Conseil National des Barreaux¹⁷⁰ (CNB) plays a role at several levels in the understanding of AI by legal actors.

The CNB primarily contributes to the debate by organising conferences on the subject of AI and formulating proposals.

Above all, it plays an advocacy role for the legal profession regarding the risks of AI use. In particular, the CNB has adopted a position on open data for court decisions: in November 2018, the general assembly of the CNB formulated some proposals aimed at ensuring equal access to court decisions between lawyers and magistrates, but also equal access for lawyers to court decisions in order to prevent unfair competition between large and small law firms.

Moreover, the Premier President of the Court of Cassation and the President of the CNB signed a joint declaration on 25 March 2018.¹⁷¹ It contains the following proposals:

- to give the Court of Cassation the responsibility of collecting and circulating the decisions of the judiciary and making available to the public a single database of judicial decisions of the judiciary;
- to involve the Court of Cassation, the first-degree and appeals jurisdictions, and the CNB in the regulation and control of the use of the database of court decisions; and
- to create a public entity in charge of the regulation and control of the algorithms used for the processing of the database of court decisions and the reuse of the information contained therein.

170 French Bar Association.

171 Revue pratique de la prospective et de l'innovation n°2, Octobre 2019, p 10.

In 2019, the Court of Cassation, in collaboration with the Ministry of Justice, hosted two data scientists whose mission was to identify data to be pseudonymised in court decisions before making them publicly available. Today, the project is being continued within the Court of Cassation. It has demonstrated the effectiveness of machine learning on pseudonymisation, and opens the way for other data science projects (eg, the search for discrepancies in jurisprudence). The Court of Cassation appears to be now at the forefront at EU level of the automated pseudonymisation of court decisions.¹⁷²

172 See <https://fichiers.eig-forever.org/posters/eig3/openjustice.pdf> accessed 6 July 2020.