# COMMENTARY ON JOHN TASIOULAS, THE RULE OF ALGORITHM AND THE RULE OF LAW

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1 When we look at what courts are doing internationally, there are clearly a range of different approaches which have been adopted to the use of AI. Whilst in most jurisdictions there appears to be a recognition that courts can and should seek to use AI in order to ensure greater access to justice and increase administrative efficiency within court systems, there is also significant reluctance to allow AI to encroach upon or undermine traditional conceptions of judicial decision-making. In most jurisdictions there appears to be a strongly held belief that, at least for the present, AI cannot and should not replace judicial decision-making.

2 The justifiability, or principled basis, of that belief is at the heart of Professor Tasioulas' careful and illuminating analysis of how judicial decision-making promotes the rule of law in ways which are not possible with algorithmic or AI decision-making. In a sense, his analysis confirms and reinforces many judges' own strong intuitive understanding that judging is something which requires reasoning towards (and not back from) a conclusion, rational autonomy and accountability, none of which can be found in algorithmic or AI decision-making, and that public confidence in the courts would be undermined were judges to be replaced by algorithmic decision-making.

3 Before turning to some of the matters raised by Professor Tasioulas, it is perhaps helpful to consider ways in which AI is already being used, or mooted, and to ask how these uses of AI intersect with the "thin" conception of the rule of law in the sense in which that term is used in Professor Tasioulas' paper. These uses seem to me to require careful analysis to work out whether they are consistent with our current conception of the rule of law.

4 Four examples illustrate this.

5 First, in Brazil, it is reported that courts use AI-driven algorithms to detect patterns in litigation, with a view to identifying abusive litigation practices and ensuring more rational judicial administration: Raissa Simenes Martins Fanton and Lucas Vieira Cicala, "*Artificial Intelligence and the Brazilian Judiciary: Challenges and Opportunities in the Litigation Sphere*", 15 April 2025. One system adopted by the Brazilian courts, VICTOR, identifies what are called topics of general repercussion for the Supreme Federal Court with a view to filtering appeals depending upon whether they meet the constitutional threshold of being an extraordinary appeal. This leads to some appeals being admitted and others being rejected: Eduardo Campos, "*Artificial intelligence, The Brazilian Judiciary and Some Conundrums*", 3 March 2023, SciencesPo.

6 The relevant constitutional requirement, or rule being implemented, is that under Article 1.035 of the Code of Civil Procedure (Act no 13.105 of 16 March 2015), which provides that:

> **Art. 1.035.** The Federal Supreme Court shall, by an unappealable decision, reject an extraordinary appeal when the constitutional matter with which it deals does not have general repercussion, pursuant to this article.
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> § 1 For the purposes of establishing general repercussion, one shall consider whether there are relevant economic, political, social or legal issues that extend beyond the subjective interests of the case at hand.
>
> …
>
> § 3 There shall be general repercussion whenever the appeal challenges a bench decision that:
> I – opposes prevailing precedent or case law of the Federal Supreme Court;
> II – (Repealed); (As amended by Law nº 13.256, of 2016) (In effect)
> III – recognises the unconstitutionality of a treaty or federal law, pursuant to art. 97 of the Federal Constitution.

7 Whilst the process of sifting appeals is, possibly, to some extent administrative, there is no question that it also intersects with the issue of whether a litigant should have his or her appeal heard, and with the manner in which published evaluative criteria are in fact applied to enable access to appellate review.

8 Second, algorithmic risk assessment can be used to inform the sentencing process which is, of course, a judicial process. In the US, the COMPAS (Correctional Offender

Management Profiling for Alternative Sanctions) algorithm uses answers to a 137 item questionnaire to predict recidivism risk. It has been met with considerable criticism, including that it is biased against certain groups of offenders and that it is more likely to lead to the jailing of an offender who would not have recidivated than the release of an offender who commits a further crime: Christoph Engel, Lorenz Linhardt and Marcel Schubert, "*Code is law: how COMPAS affects the way the judiciary handles the risk of recidivism*" (2025) 33 *Artificial Intelligence and the Law* 383-404*;* Kieran Newcomb, "*The Place of Artificial Intelligence in Sentencing Decisions*" *University of New Hampshire Inquiry Journal* (Spring 2024 issue). Again, assessment of risk seems to me to be a substantive task for courts. Even if an algorithmic output informs only part of the process, it does raise questions as to the extent to which the process as a whole meets the essential requirements of the rule of law.

9 Third, the UK government published an AI action plan for justice policy paper on 31 July 2025. One of the three strategic priorities identified in this policy paper is to embed AI across the justice system, including by "supporting better decisions through predictive and risk-assessment models (e.g. predicting the risk of violence in custody)". The policy paper also identifies that "machine-learning models can help identify patterns in complex evidence bases, including social, economic and environmental data". This suggests that increasingly, AI systems may be used to inform, and support, decision-making that may well come to include judicial decision-making.

10 Still in England, where the current Master of the Rolls is a technology enthusiast, there is also the highly publicised instance of a judge on the Court of Appeal having used Chat GPT to summarise a complex area of the law and (having satisfied himself as to its accuracy) using that summary in his judgment, very publicly describing this process as "jolly helpful": Hibaq Farah, "*Court of appeal judge praises 'jolly useful' ChatGPT after asking it for legal summary*", 15 September 2023, The Guardian.

11 Fourth, in China, for many years there has been a Smart Court Reform which aims to integrate information technologies into judicial processes. It is reported that AI is used in some Chinese courts for a number of tasks, including to alter perceived human errors in a verdict. It is also reported that an AI platform known as Phoenix has been rolled out in a number of courts, and that the tasks performed by Phoenix include preparing

an in depth analysis for the judge to use as preparation, and preparing a draft judgment which the judge then reviews and signs. In one report in April 2025, it is said that this platform has been used for over 15,000 cases, boosting efficiency by nearly 40 percent: Leng Shumei, "*AI technologies integrate into Chinese people's daily lives at an accelerating pace*", Updated 21April 2025, Global Times; A.D. (Dory) Reiling and Straton Papagianneas, "*Lessons from China's Smart Court Reform?*" (2025) 16(1) *International Journal for Court Administration* 2.

12 With that preamble, I turn to three, somewhat disparate, comments I wish to make on Professor Tasioulas' paper.

13 First, and consistent with the illustrations I have already given, there is a real danger of what I will call technology creep, which may or may not be consistent with the rule of law as understood in Professor Tasioulas' paper. The use of AI in a way which is characterised as supportive or procedural, and not adjudicative, is more readily seen as acceptable within the justice system. Consistent with this, AI has been described as a capability builder for courts, and a "bridge, allowing users to cross gaps in the justice system": The Honourable Justice Aidan Xu*, "Legal and Regulatory Issues with Artificial Intelligence: The Use (and Abuse) of AI in Court"*, 30 July 2025, IT Law Series 2025.

14 It is important, however, to realise that supportive or procedural uses of AI may well have an important influence upon substantive judicial outcomes whilst at the same time being consistent with an ongoing position that AI is not used in judicial decision-making. Consider the examples I have just given of risk assessment, the sifting of appeals or use of AI summaries, case analyses, draft judgments or parts of judgments. Use of these technologies raises the question whether the judicial process as a whole has met the characteristics of being based upon general rules promulgated to their subjects in advance or necessarily being stable over time.

15 If it is not possible to know precisely what standards were used in providing the supportive technologies, it may also be doubtful whether the legal standards announced are congruent with those followed in reaching the decision. This means that some care is needed even as regards technologies that are classified as supportive, rather than

adjudicative, uses of technology. A report by the UN Special Rapporteur on 16 July 2025 identified the risk of "automation bias", being "the tendency to consider uncritically solutions offered by technology, such as AI, as correct – may render human input ineffective": *Report of the Special Rapporteur on the independence of judges and lawyers, Artificial intelligence in judicial systems: promises and pitfalls*, 16 July 2025.

16 Moreover, as such supportive or procedural tools become accepted, this may lead to the introduction of other, potentially more extensive, uses of AI within judicial systems. For example, in Singapore the judiciary are considering deployment of AI to provide first-cut indications of outcome to parties for some high volume case types where there are clear criteria and factors influencing the outcome: The Honourable Justice Aidan Xu*, "Legal and Regulatory Issues with Artificial Intelligence: The Use (and Abuse) of AI in Court"*, 30 July 2025, IT Law Series 2025.

17 Second, it seems to me necessary to think closely about how the common acceptance of decision-making by juries might suggest that so-called "black box" decision-making can, in certain circumstances, be consistent with public confidence in judicial systems. Jury decision-making is entirely devoid of explanation. It is premised upon juries following directions but there is no way of testing whether or not that was the case. It thus lacks the explainability and reciprocity which Professor Tasioulas recognises as central to the idea of respect for rational autonomy which, in his analysis, is the hallmark of the rule of law. Jury decision-making also lacks the accountability that can be provided where reasons are given for decisions. The acceptability within society of the role of juries, which is itself a form of black box decision-making, might suggest that it is not the lack of explainability or reciprocity which is problematic in automated decision-making, but that the difficulties lie in the total absence of the human and moral framework that we associate with justice and the rule of law.

18 Third, it might be necessary to evaluate the compatibility of AI systems of decision-making with the rule of law with an understanding of the particular political background within which decisions are made. Given the instances we see today of encroachment of autocratic governments on judicial independence, or the politicisation of even apex courts within democratic systems of government, the comparative disbenefits of AI from the perspective of the rule of law may require further analysis. This is particularly

so given that in a context of political influence, even with an ethical and well intentioned judicial officer, it may be difficult to be confident that the reasons for decision truly reflect all that led to the particular decision being reached. Political allegiance may lead to what has been described as "noise" (meaning unwanted variability) or possibly even "bias": terms used eg by Cass Sunstein, "*Governing by algorithm: no noise and (potentially) less bias*" (2022) 71 Duke L.J. 1175 at 1178. Similarly, there may well be issues with public confidence in judicial decision-making in that political context. That might suggest advantages in AI decision-making which might not be apparent in a truly independent judiciary not influenced by political affiliations or allegiances.

19 This raises the obvious question whether or not algorithmic decision-making might also be susceptible to political or governmental influence. That, in turn, requires a focus upon the transparency of the algorithm used, and of the rules generated within an AI system, to reach a particular decision. As a practical matter, use of AI systems requires a degree of technological input. It is unlikely that judges will themselves be creating the AI systems or algorithms used and it is perhaps also unlikely that judges will understand how the technology actually works. This leads to risks. As the UN Special Rapporteur recently explained, "judicial independence may be undercut by the influence exerted by political branches of government and even by private companies in the design, development, training and deployment of AI solutions used in judicial systems."

20 As Professor Tasioulas' analysis shows, it is important to look closely at what we regard as important about the administration of justice, and the legitimacy of both judges and the law itself, before bowing to a desire for efficiency and cost-effectiveness and allowing judicial decisions to rely upon or be influenced by AI technology. Analysis, such as that from Professor Tasioulas in his paper, provides invaluable assistance in this task. It also shows why the use of AI by courts, and judges, might give rise to considerations different from those that arise in other areas of administration or government. Professor Sunstein describes the use of algorithms as being motivated by the limitations of human judgment: see [18] above, at 1203. But different considerations must apply where human judgment, and reasoning, and the involvement of a human being with the capacity for rational autonomy is itself (for the reasons explained by Professor Tasioulas) important for the maintenance of the rule of law.