

PRINCIPLES FOR THE USE OF ARTIFICIAL INTELLIGENCE (AI) IN THE JUDICIARY AS DERIVED FROM THE EUROPEAN ETHICS CHARTER. JUSTICE EFFICIENCY AND LIMITATIONS

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Abstract: *The European Ethical Charter on the use of AI in judicial systems approaches in a holistic way the integration of judicial policies by including precise provisions in national legislations, and for judicial bodies and legal professionals - the thinking and testing of the tools used, because AI is not confused with digitization. The use of AI must respect the principles included in the Charter, the fundamental rights and freedoms laid down in the CFREU, in order to ensure the feasibility of the data legal framework for the application of AI, in accordance with the standards imposed by the Council, democracy and the rule of law. The aim is to increase the efficiency of justice and set limits to the use of AI.*

Key words: *AI, efficiency of justice, limitations.*

1. Introduction

It is a well-known fact that with the unprecedented development of science since the industrial revolution and especially after the Second World War, society has become technologized, and digitization and artificial intelligence have become an important part of all fields of activity, the benefits of which are part of everyday life, including in the field of justice. In addition, during the SARSCOV-2 pandemic, especially during periods of lockdown, a variety of applications have been used and developed to speed up investigation, improve crime investigation and judicial cooperation, especially to guarantee respect for human rights. On the other hand, the development of technology and in particular artificial intelligence, with particular reference to ChatGPT 4, raises concerns among civil society and the public, so states have an obligation to ensure that the use of these technologies is carried out in compliance with the rule of law, the protection of personal data and the fight against cybercrime, as regulated by the Council of Europe (<https://www.consilium.europa.eu/en/policies/rule-of-law/>) and by the Recommendation on the Ethics of Artificial Intelligence adopted by UNESCO on 23 November 2021 (https://www.cnr-unesco.ro/uploads/media/f1077_recomandari-

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[unesco-ai-site.pdf](#)). Although we can assert that in this particular field digitization is more than desirable and extremely useful (Stănilă, 2020), artificial intelligence and its involvement in various sectors of activity requires analysis by the best specialists. Above all, in our opinion, various studies should be carried out to establish the advantages and disadvantages of its use in the judicial process and, above all, to ascertain the extent to which the fundamental principles of the proceedings, either civil or criminal, in the broadest sense, can be respected, with special reference to the principle of humanism which is the corollary of all in criminal proceedings. It is crystal clear to everyone that when using artificial intelligence in the judicial process, malicious people, particularly those who have access to the dark web – the surface internet occupies only 4% (such as Google, Bing, Firefox, Wikipedia), the deep web occupies 90% (e.g. access to public documents, medical records, etc.), and the dark web occupies 6% (contains information about arms trafficking, drugs, people, money laundering, terrorism), (Tal, 2023) - will try to "attack" the systems in order to obtain advantages or even favorable rulings. In regard to the threats and risks involved in the use of artificial intelligence in all fields, including the judicial sector, specialists have tried and succeeded in outlining a number of ethical principles to regulate artificial intelligence in accordance with European standards on human rights, the state of law and the rule of law.

2. Digitization and AI

The future seems to belong, to a significant extent, to digitization and artificial intelligence, although these systems should be used to generate a variety of economic, social and environmental services and benefits, especially in high-impact areas of activity. However, it is absolutely necessary to note that the use of artificial intelligence has the potential to fragilise areas such as human rights, sectors of the economy and the business environment. Therefore, all stakeholders and decision-makers agreed that a well-balanced approach is needed, in the sense that the benefits offered also generate risks or potential negative consequences for people and/or society. In the legal and judicial system (and beyond) there is a need for a clear distinction between digitization and the use of artificial intelligence. Thus, a clear, simple and very close to reality definition of digitization is given: *"a process by which analogue processes and physical objects are converted into digital form"* (<https://ro.economy-pedia.com/11041145-digitization>). This involves a change of format, usually by means of applications such as, for example, electronic file and TDS (through the electronic file and document transmission in electronic format -TDS- application, the parties and lawyers have access to all the documents filed which they can view without having to go to the court or prosecution unit), ECRIS (through the ECRIS application, files are registered at the court and the information is constantly updated centrally through the portal.just.ro database; in the interface dedicated to the public, court hearings, parties, unique case numbers, time limits granted, decisions rendered are accessible in the application), as well as legislative databases that are extremely useful for practitioners (such as, for example, lex-expert, lege5, Legis, N-lex or those centralized at the level of the Ministry of Justice or the Superior Council of Magistracy, which contain not only legislation but also the most recent decisions rendered by the High Court of Cassation and Justice, the Constitutional Court or the European Court of Human Rights) or online scientific

publications. All these systems are, in fact, “search” systems, searching for information in various databases (the list is only illustrative, as space does not allow an exhaustive enumeration, and it is random) and are designed to facilitate and simplify the work of a practitioner, and for years have proved not only useful but also effective. Conceptually, artificial intelligence has been defined as “software (and possibly hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving the environment through the acquisition of data, interpreting collected data, structured or unstructured, reasoning based on knowledge or processing information based on algorithms, reasoning and knowledge representation derived from this data, and deciding the best action to be taken to achieve the given goal. Artificial intelligence systems can either use symbolic rules or learn a numerical model, and can also adapt their behavior by analyzing how the environment is affected by their previous actions” (Muller, 2020 <https://allai.nl/wp-content/uploads/2020/06/The-Impact-of-AI-on-Human-Rights-Democracy-and-the-Rule-of-Law-draft.pdf>). Artificial intelligence in the justice system is like turning a ChatGPT into a judge. This is the case in Estonia, which in 2019 put into operation the handling of disputes worth up to €6,400 by the so-called “Judge-robot”, the name was later changed to “payment order system”. The claim is uploaded on the dedicated website (www.e-toimik.ee). It should be noted that in this country every person has a verified electronic identity. The Estonian Ministry of Justice, through a state secretary at the time (Kai Harmand, interview taken from [juridice.ro, https://www.juridice.ro/643353/estonia-procese-civile-cu-miza-de-sub-6-400-euro-sunt-rezolvate-de-robot.html](https://www.juridice.ro/643353/estonia-procese-civile-cu-miza-de-sub-6-400-euro-sunt-rezolvate-de-robot.html)) stated that the system “is not defined as a judge-robot, but an automated system, for two reasons: it is not a judge, to be a judge means to do justice and you consider several possibilities, you listen to both sides, you consider evidence. But this automated system doesn’t do that: it is very well established by law what kind of disputes can be settled, we call it a payment order system.” Although this system is still called the “algorithm for payment proceedings”, there are rumours that the system will also work for larger sums or divorce cases. We believe it will be interesting to see how the AI system will assess certain personal grounds for divorce, such as excessive jealousy, adultery, verbal violence or other reasons that are purely subjective, such as the care that should be taken by the spouses for each other or for other family members - children, parents. An interesting example worth mentioning in highlighting the effectiveness of using these systems is that of a lawyer in the US who invented a civil lawsuit which he brought to court and even invoked court precedents in support of it by using ChatGPT4.0. The defendant in the case submitted a brief in which he claimed that he had checked the decisions relied on as judicial precedent (it being known that in the common law system judicial precedent is the fountainhead of law) and that these did not exist. The judge requested the files on which these precedents were based and because they did not exist, the lawyer admitted that his partner had used ChatGPT4.0 to invoke precedents. In front of the judge, ChatGPT4.0, when questioned, claimed to have found these cases in the archives, although they never existed. The research failed to establish whether it was a “hallucination” of the system or of the program and the lawyer invoked these precedents in good faith or simply the lawyer wanted to demonstrate that the artificial intelligence system could not be used in the justice system (Dobrea, 2023). The author of the paper noted (as a cyber security specialist at the Xeduco Institute) that these systems are susceptible to “hallucinations” and that “the

system does not admit it is wrong because it knows it has more information than a human". It was also pointed out by the author of the paper that specialists in the field have drawn attention to the fact that different answers have been given to the same questions asked of the system in succession and that *"their use puts human rights at risk"*. This was also the conclusion of specialists in the USA, so that the use of ChatGPT is banned, from 2023, in this state, including in schools, but also in emerging technologies and in other states, because of the risks that could be generated for people.

3. General Framework of Principles for the Use of AI according to the Ethical Charter for the Use of Artificial Intelligence in Justice Systems and their Environment

The Ethics Charter was adopted at the 31st Plenary Meeting of the CEPEJ, 3-4 December 2018. The ad-hoc Committee on Artificial Intelligence (<https://www.coe.int/en/web/artificial-intelligence/cahai>) has developed several studies based on the Council of Europe standard in the fields of human rights, democracy and the rule of law, working with several stakeholders in the field, including scientists, observers or legal experts, but also specialized bodies of the Union and UNESCO. The specialists of this committee have concluded that it is imperative to respect a set of rules regarding the use of artificial intelligence and to draw up an ethical guide to constitute the legal framework, in particular for the protection of these values. The Committee mapped the ethical principles on artificial intelligence developed by private, scientific and civil organizations, in order to identify those which could lead to the establishment of the much needed legal framework in the light of the standards imposed by the Council. The guidelines adopted by the Committee stressed the need to develop a global legal mechanism to address the challenges posed by the use of artificial intelligence and were guided by the European Ethical Charter on the Use of Artificial Intelligence in Legal Systems and their Environment, adopted at the 31st Plenary Meeting of the CEPEJ, as a basis for the use and regulation of digital technology at a global level. Obviously, this document is closely in line with other Council activities on artificial intelligence, such as the White Paper on AI (<https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52020DC0065>) adopted on 19.02.2020, OECD (Organization for Economic Cooperation and Development) reports, UNESCO, so as to ensure coherence of sectoral policies on the subject at global level, the main aim being to fully ensure human rights, the rule of law and the supremacy of law. All this, based on the proven fact that *"financial markets have reacted and demonstrated the manner in which systemic risks arise under the assumption that different artificial intelligence systems interact at very high speeds and has led to the proliferation of the number of financial collapses"* (Wellman & Rajan 2017, 609-624). The author of the study pointed out that when *"critical energy infrastructures, transportation, hospitals, progressively depend on automated decisions of artificial systems, new vulnerabilities are created in the form of a single point of failure that produces large-scale effects"*. The same author also noted that since these *"critical infrastructure systems are introduced, they will be difficult to replace in the event of failure"*. Therefore, it is clear that these systems should be used with extreme caution and only after configuration, testing and verification of their feasibility.

4. Principles laid down in the European Ethical Charter

4.1. Principle of respect for fundamental rights

Assuming that the cornerstone of respect for the rights and freedoms of the individual in any proceedings (civil or criminal, in the broadest sense) and that any judicial decision is based on respect for all the rights laid down in the European Convention on Human Rights and Fundamental Freedoms, the principle also establishes that in the event of the use of any artificial intelligence system in the settlement of a case these principles will be respected. This is mainly to ensure that the use of such systems will not compromise or undermine respect for the fundamental principles of the trial, with reference to the right of access to a judge, the right to a fair trial as a whole, respect for the principle of equality of arms, and the independence of the judge, in addition to the other principles governing the trial (civil or criminal). From this perspective, the solution proposed and implemented in Estonia of using the “*payment order system*” or “*robot judge*” is at least questionable, since in our opinion, an artificial intelligence system, independent of access to a huge amount of information and algorithms for processing, analyzing and deciding, will not be able to replace or at least respect equality of arms, besides raising the question of how the system could directly or indirectly violate fundamental values. Following this line of reasoning, we would observe that this and other points, as we shall show below, demonstrate the fragility of the solution adopted by the Estonian system.

4.2. Principle of non-discrimination

Although it is obvious that intelligence systems have the ability to detect and process discrimination, through the use of criteria for classifying data and information about groups, individuals or data, specialists have considered that it is imperative to obtain all guarantees that the methods used do not reproduce or aggravate discrimination and that they “*do not lead to analysis or uses of a deterministic nature*” under international law (even through the indirect use of sensitive information, emphasized by the CEPEJ when adopting the Ethics Charter which is the subject of this scientific approach and also highlighted by UNESCO in the Recommendation on the use of artificial intelligence adopted on 23 November 2021). In the light of this principle, we believe that it is necessary to reduce and eliminate digital gaps between actors (state institutions between themselves, between them and individuals and, last but not least, between states, s.n.), so that all institutions, organizations, agencies, individuals (private individuals or legal entities) have access to these systems. For this reason, the UNESCO Recommendation on the use of artificial intelligence, mentioned above, stipulated that the more technologically advanced states should be in solidarity with the less advanced ones in order to ensure that the benefits of these technologies are also available to states and individuals with a lower level of technological development. Otherwise, there would be clear discrimination between those who have access to such a system and those who do not or have limited access. The stated aim of adopting this Recommendation is that, ultimately, artificial intelligence “*contributes to a more equitable world order in terms of information, communication, culture, education, research and socio-economic and political stability*”.

4.3. Quality and security principle

This principle concerns the way in which information, data, is processed and used in a trial, in a secure technological environment and through a multidisciplinary approach (emphasis CAHAI working group, cited above). The principle recommends that in the design of machine learning systems their developers should be supported by legal specialists to enable a holistic approach and continuous improvement of technological systems in line with the changing needs of the justice system. It is essential in implementing this principle that all information and data, including and especially judicial decisions, are from certified sources and that the entire process is traceable. In addition, everything must be executed in an absolutely secure environment, so that the systems are intangible and beyond malicious attack.

4.4. Principle of transparency, fairness and impartiality

The need for the methods and means of processing information and data to be accessible to users, easy to understand, and to accept verification, such as external audits, is stressed.

The principle requires achieving and maintaining a balance between intellectual property rights of means of processing and impartiality, transparency, fairness and intellectual integrity, as well as prioritizing the interests of justice (Council of Europe MSI-NET study "*Algorithms and Human Rights*", <https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5>). Any gaps or failures in the functioning and operation of these systems can have negative and long-term consequences on people's lives and should be avoided. In this regard, experts have established that the granting of certification and verification of the means and methods used must be periodically reviewed and revised, precisely in order to produce any negative consequences on people's lives (Report of the Committee on Artificial Intelligence presented in the House of Lords in Session 2017-19 "AI in the U.K.: ready, willing and able?", <https://publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf>).

4.5. Under user control principle

By the nature of the provision, the CAHAI working group specialists commented that the principle "*excludes a constraining framework*" (legal and technical) and it is necessary that all users of the systems are very well informed about the possibilities offered by them, so that they have permanent control over the systems, from the perspective of increasing user autonomy. From this perspective, it is desirable that specialists in the judicial system should be able to check and review the data, information or decisions entered into the system and not be bound by the specific features of a particular case. It is true that the allegation is more concerned with common-law systems where judicial precedent is the fountainhead of law, but it can also be applied in continental systems by referring to the need to unify judicial practice in a particular area where the applicable legal provisions are susceptible to several interpretations. This concerns situations where the law does not meet the requirements of clarity (in terms of the methodology for drafting legislation), foreseeability and predictability. For this reason, the experts of the working group stated that the user must be informed of the

hypotheses in which *“the solutions offered by artificial intelligence systems are or are not mandatory, whether there are other possible options, including the fact that he or she has a right to a court and to legal advice”*.

5. Conclusions

From the analysis of all the possibilities offered by technology that can be successfully used in the judicial system, we may observe, without claiming to be exhaustive, that digitization and its solutions have already proven their effectiveness. It is true that these applications have also sometimes been the target of attacks by people who have tried to use them fraudulently or by organized and/or cybercrime groups. These have caused serious concern about the integrity of artificial intelligence systems, as they open up new avenues and possibilities not only for real and fair users, but also for those whose intentions are malicious. Experts have argued that the impact of the use of these systems presents emerging risks that should be mitigated to extinction (Ivan, 2023). At present, as a result of these emerging risks, several countries have banned the use of artificial intelligence systems, such as the USA, Italy which has since reversed its decision, Germany, France and Ireland have been petitioned yet no decision has been made. On the other hand, it should be noted that when used by specialists, artificial intelligence systems can be very useful in the investigative work during criminal prosecutions, as they can speed up the investigation, particularly with regard to ransomware, phishing and deep phishing, terrorist propaganda and malicious misinformation on social networks and many other such crimes, and have a beneficial effect both in terms of much faster identification of persons who have committed or are preparing to commit crimes and in the process of proving them. It remains the task and obligation of decision-makers to ensure the security and integrity of these systems, although, in our opinion, it will never be possible to replace judges and prosecutors with these systems on the grounds that the principle of humanism, along with others, would remain meaningless and merely demagogic.

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