

IMPLEMENTATION OF THE EUROPEAN ETHICAL CHARTER ON THE USE OF ARTIFICIAL INTELLIGENCE IN JUDICIAL SYSTEMS AND THEIR ENVIRONMENT

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Abstract

The European Commission for the Effectiveness of Justice (CEPEJ) of the Council of Europe adopted at the end of 2018 the first European document setting out the basic principles of the use of artificial intelligence (AI) in national judicial systems, principles that reflect both fundamental values and essential methodological requirements for the creation and development of algorithms. The degree of development of access to justice in AI instruments, however, differs from state to state, starting from random distribution of cases, processing of judicial decisions and data by AI, tools of predictive justice up to the solving of cases by a robot.

Keywords: *European Commission for the Efficiency of Justice (CEPEJ), artificial intelligence (AI), European Ethical Charter on the use of artificial intelligence in judicial systems*

I. Introduction

Currently, in a rule of law, the justice system must be adapted to the demands of a democratic, stable and responsible society. Creating a modern, integrated, efficient and transparent judicial system, with reduced length of the trials and with a unitary jurisprudence, a predictable justice can be achieved if there is a permanent concern for the improvement of the related normative and institutional framework, for the implementation of some standards based on integrated strategic management, efficient resource management and the use of innovative means of solving justice problems, which confer quality to the act of justice.

The challenges of the last decades in the field of justice and the realization of the act of justice require adequate answers from the institutions and bodies responsible for administering the judicial system. Increasingly, the judiciary is fulfilling its role of public service, both by carrying out the act of justice, and by establishing a new type of relationship between justice and the justice seekers. An

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important role in this context is the incorporation of information and communication technologies (ICT) in the justice administration activity. At the level of the Council of Europe there are statistical data regarding "European judicial systems: the efficiency and quality of justice: the use of information and communication technologies in European judicial systems"¹ regarding cyber-justice, this being considered, as has been repeatedly stated in the doctrine, as encompassing all cases where the application of new technologies is part of the activity of dispute resolution. One of the first steps was the random distribution of cases, then the implementation of a system for accessing files online, as very useful steps in the development and implementation of European digital justice policies.

Obviously, the increasing importance of artificial intelligence in contemporary society, the large-scale incorporation of new information and communications technologies in the justice administration activity, the design and implementation of artificial intelligence solutions for those who work in the field of justice, imposed the adoption of an ethic code. The relevance of these ethical and human rights considerations is reinforced by recent criticisms of the implementation of artificial intelligence in establishing the risk of recidivism of the convicted under the COMPAS system (Correctional Offender Management Profiling for Alternative Sanctions) in the United States. According to a study, the program mistakenly placed a higher rate of people of Afro-American origin² in the category of persons at risk of recidive. Despite criticism from civil society, the Wisconsin Supreme Court³ has come to the conclusion that using the COMPAS program as a means of proof does not contravene the right to a fair trial, as long as the results obtained by using the software are also supported by other means of providing evidence.⁴

An algorithm similar to the North-American program was also used in the judicial system of some cantons in Switzerland. ROS (Risikoorientierter Sanktionenvollzug) represented a system whose primary purpose was the prevention of recidivism during and after the execution of the sentence.⁵ This was part of an experiment initiated by the Federal Office for Justice, aimed at testing the gradual introduction into the practice of penitentiary institutions in certain cantons of orienting the execution of a sentence according to the risk of subsequent offence of the convicted person. According to the final report of the Authority for the administration of penitentiaries in the canton of Zürich, the results obtained at the end of the project were positive.⁶ It is worth mentioning, however, that the

¹ Studies CEPEJ o. 24 2016 edition

² <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

³ Wisconsin v. Loomis, 13.07.2016.

⁴ See also K. Freeman, Algorithmic Injustice: How the Wisconsin Supreme Court failed to protect Due Process Rights in State v. Loomis, North Carolina Journal of Law and Technology, 18/2016, p. 96.

⁵ <https://www.rosnet.ch/>

⁶ Amt für Justizvollzug Kanton Zürich, Schlussbericht Zusammenfassung Modellversuch Risikoorientierter Sanktionenvollzug, 23.05.2014.

classification of ROS in the category of algorithms that develop artificial intelligence has not been confirmed.⁷

At the level of the European Union, the Agency for Fundamental Rights (FRA) has also acknowledged the danger of discrimination in decision making based on data, by publishing in February 2018 a report presenting the main situations in which the use of algorithms can lead to infringement of art. 21 of the Charter of Fundamental Rights and the ways in which such discrimination can be prevented. Such measures are ensuring transparency regarding the data underlying the algorithms, conducting impact studies of the algorithms on fundamental rights, or checking the quality of data.⁸ In January 2019, FRA launched a research project on the benefits and disadvantages for the fundamental rights of the implementation of artificial intelligence in the public administration. The European Commission has also set up an independent group of high-level experts, charged with promoting a reliable implementation of artificial intelligence, which respects the principles of ethics and all the legal norms in force.⁹

All this has led the European Commission for the Efficiency of Justice to adopt at the end of 2018¹⁰ the European Ethical Charter for the use of artificial intelligence in judicial systems and their environment. This is the first European regional instrument that envisages a framework of ethical principles that can help lawmakers, decision-makers, but also those who perform the act of justice to cope with the rapid development of artificial intelligence and its on-going application in national judicial processes.¹¹ Also in 2019, the Parliamentary Assembly of the Council of Europe has decided to set up a new sub-committee on artificial intelligence and human rights¹² In this way the CEPEJ can contribute to the improvement of the activity of justice, to its efficiency in increasing the quality of the act of justice, while respecting the individual fundamental rights, guaranteed at regional level, first of all through the European Convention on Human Rights and Fundamental Freedoms by the Council of Europe Convention on the Protection of Personal Data (ETS no.108) and by the Protocol amending the Convention on the Protection of Personal Data (CETS n.223). One problem that arises at this point is that, if the states of the European Union have signed and ratified the Conventions above, the same cannot be said with the aforementioned protocol, which has not yet been ratified until now by any of the member states of the Union.

⁷ Amt für Justizvollzug Kanton Zürich, Schlussbericht Zusammenfassung Modellversuch Risikoorientierter Sanktionenvollzug, 23.05.2014.

⁸ FRA, Focus Paper Big Data: Discrimination in data-supported decision making, 2018, p. 11.

⁹ The high level Independent Group of Experts on Artificial Intelligence. Orientations in the field of ethics, Bruxelles, 2019.

¹⁰ Adopted in the 31st plenary session of CEPEJ

¹¹ N. Braun Binder, Künstliche Intelligenz und automatisierte Entscheidungen in der öffentlichen Verwaltung, Schweizerische Juristen-Zeitung 115/2019, pp. 467-476.

¹² OECD, Artificial Intelligence in Society, 2019, p. 139.

II. Principles to be followed in using AI

The principles that must be respected in the use of artificial intelligence in justice, according to the mentioned Charter are the principles that underpin the 21st century European democratic society, which faces certain types of problems, challenges and opportunities, a society that undergoes some internal difficulties, which are specific to the functioning of democracy in some countries or which faces a certain international context. These challenges identified by the Council in some of its activities or more precisely of its institutions, taking into account the opportunities that the Council has especially in the exploitation of new technologies should be perceived, why not, even as a support for democracy on our continent.

1. Respecting the human rights

Since the principles of the Council of Europe are pluralistic democracy, respect for human rights and the rule of law,¹³ it is natural that the CEPEJ Ethics Charter states as its first principle: "The principle of respect for fundamental rights: ensuring a conception and application of artificial intelligence tools and services that are compatible with fundamental rights". This is especially important if one considers that for Europe's democratic future the use of new technologies is needed both for the purpose of strengthening, consolidating democratic commitments, and also for understanding the impact of technological developments on certain aspects of the Council's way of acting.

2. The principle of non-discrimination

Because judicial activity is an essential component of a democratic society, which aims to resolve disputes between the parties in such a way as to respond to the demands of the right to a public and fair trial, ensured by an independent and impartial court, respecting the equality of arms, another important principle that is stated in the Charter is "The principle of non-discrimination: the specific prevention of the creation or intensification of any discrimination between individuals or groups of individuals".

3. The principle of quality and safety

Because the judicial activity involves in a democratic society the protection of human dignity, of private life, the person's reputation, the presumption of innocence and so on, it is necessary to respect an essential principle, mentioned by the CEPEJ Ethical Charter, "The principle of quality and security: regarding the

¹³ See I. Moroianu Zlătescu, *Human Rights a dynamic and evolving process*, ProUniversitaria Publishing House, Bucharest, 2015, p.93; I. Moroianu Zlătescu, P.E. Zlătescu, *Du droit international comparé des droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme*, *Fiat Iustitia* no.2/2016, p.165 and subs.

processing of judgments and judicial data, using certified sources and intangible data with models designed in a multidisciplinary way, in a secure technological environment".

4. The principle of transparency, impartiality and intellectual integrity

But, because from the activity of the various courts, the importance of establishing direct relations between the courts and the public as a whole has been appreciated, it has been considered that the insertion of justice in the society presupposes an outwards openness from the judicial institutions, which should learn to make themselves known contributing to the transparency of justice. Of course, this transparency cannot be total. It also implies the need to protect the effectiveness of investigations and the interests of the persons concerned. In these conditions, another basic principle, which is found in the Charter is "The principle of transparency, impartiality and intellectual integrity: to make the methods of processing data accessible and intelligible, to authorize external audits".

5. User control

The last principle stated in the Charter implies a great responsibility for all those involved in the use of artificial intelligence in the act of justice. This is the "Principle under the control of the user. It excludes a prescriptive approach and ensures that users are informed actors and who control their choices".

III. Conclusions

As it clearly results from the Charter, the principles referred to above should help everyone involved, from decision makers to justice seekers to cope with the rapid development of artificial intelligence in the proceedings before national courts. These principles should be applied followed by reassessments that must take place regularly in order to permanently improve the practices in the field, and in the event of a failure or a partial failure, the situation will be analysed and depending on the result, an action plan is drawn up to take the necessary measures. Also, the independent authorities provided by the Charter can, upon request, assess the situation of the states' adherence to the principles of the Charter and may propose measures to adapt to the evolution of technologies and their use. The improvement of the quality of the justice act aims, at present time, to reduce the duration of dispute resolution, to unify the jurisprudence and not lastly to modernize the status of some autonomously organized legal professions. If the legal premises for speeding up the settlement of cases have been ensured by adopting regulations that correspond to the current evolution of society, they must be supported by the use of new technologies to achieve predictable justice.

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