Background Paper

Conference of Ministers of Justice

"Digital technology and artificial intelligence – New challenges for justice in Europe"

5 October 2021 – Gödöllő, Hungary

organised by the Hungarian Presidency of the Committee of Ministers

and the

Council of Europe

With digitalisation pervading every corner of our lives, expectations as regards the efficiency and quality of justice are also growing. On the part of citizens accustomed to electronic administration, there is a definite demand for the possibility to bring their actions online, to access the documents of proceedings without having to appear in person and to testify remotely. In the last two years, the COVID-19 pandemic has created new challenges, which highlighted the role of digital technologies in ensuring time-effective and uninterrupted access to justice. However, no state can tackle the challenges of digitalisation on its own. Therefore, every initiative and best practice is of utmost value that can help facilitate more efficient judicial procedures through the use of electronic means and, increasingly, artificial intelligence-based applications, including both domestic procedures and cross-border cooperation between judicial authorities of the Member States of the Council of Europe (CoE).

Recognising these needs, at the conference of the Ministers of Justice on *"European Justice Facing the Challenges of Digital Technology"* held under the auspices of the French Presidency in October 2019 in Strasbourg, French Minister of Justice, H. E. Nicole Belloubet initiated that the Council of Europe's Ministers of Justice meet every two years as a forum to examine issues relating to the impact of digital technology on access to justice and judicial proceedings.

Joining the French Presidency's initiative, Hungary intends to promote a substantive dialogue among the Member States. With the Council of Europe as co-organiser, the Hungarian Ministry of Justice will host the upcoming conference of the Ministers of Justice on 5 October 2021. In exchanging views, the ministers will have the opportunity to discuss further challenges and achievements related to the digitalisation of justice that have emerged in the last couple of years, in particular the Convention-compliant use of electronic tools and artificial intelligence in judicial proceedings. The agenda of the conference has been built on the diverse work of the Council of Europe in the field of justice, information society, algorithms and artificial intelligence.

The Council of Europe and its Member States have been committed to promoting and protecting human rights, democracy and the rule of law since 1949. While in the decades since then Europe has undergone a series of fundamental changes, the Council of Europe has demonstrated resilience and an ability to respond and adapt rapidly to new challenges. The European Convention on Human Rights has provided a solid and timeless foundation for protecting European values. Nevertheless, today the Convention's institutions are facing unprecedented changes in European societies driven and amplified notably by technological developments.

Access to justice, anonymisation of decisions, non-discrimination, equality of arms, adequate judicial protection and data protection are all of key concern in the use of new technologies in the justice system, in particular when artificial intelligence (AI) systems are involved in the decision-making process. Europe has the potential to set global standards in this field, and the most convenient forum for this is the Council of Europe.

There is an ongoing dialogue and cooperation among Council of Europe Member States on the use of digital tools in the field of justice within the framework of the European Commission for the Efficiency of Justice (CEPEJ). In addition, seminal work is in progress in the Ad hoc Committee on Artificial Intelligence (CAHAI) on the legal framework for the development, design and application of artificial intelligence on the basis of the standards of the Council of Europe.

The possible adverse effects of some AI applications used in judicial systems raise serious concerns. The *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*[1] adopted by CEPEJ in December 2018 sets five key principles for the use of AI systems in this field, namely respect of fundamental rights, non-discrimination, quality and security, transparency, impartiality and fairness, "under the control" of the user. Since its adoption, the Charter has become a widely used reference point for both ethical and legislative aspects of AI. CEPEJ underlines the risks of "performative effect", delegation of responsibility and the lack of transparency of judicial decision making.

In May 2019, the Commissioner for Human Rights of the CoE issued a *Recommendation "Unboxing artificial intelligence: 10 measures to protect human rights"*[2]. This document sets out a series of practical recommendations to national authorities on ten main areas for action: human rights impact assessment; public consultations; human rights standards in the private sector; information and transparency; independent oversight; non-discrimination and equality; data protection and privacy, etc.

In April 2020, the Committee of Ministers adopted the *Recommendation on the human rights impacts of algorithmic systems*[3]. The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) published its *Guidelines on Facial Recognition*[4] in January 2021. Introducing new principles, such as transparency, Convention 108, as modernised by an amending protocol (Convention 108+[5]), sets global standards on the rights to privacy and data protection of individuals. These standards are ensured with appropriate safeguards and apply regardless of technological evolutions.

In December 2020, the CAHAI has adopted a feasibility study outlining possible options for a CoE legal framework for the design, development and application of AI[6]. The study points out that an appropriate legal framework is likely to consist of a combination of binding and non-binding legal instruments that complement each other: a binding instrument, such as a convention or framework convention of horizontal character, could consolidate general common principles, while additional binding or non-binding sectoral CoE instruments could address challenges brought by AI systems in specific sectors.[7]

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[1] CEPEJ, European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment.
[2] Recommendation by the Council of Europe Commissioner for Human Rights on Unboxing Artificial Intelligence.
[3] Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems.
[4] Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), Guidelines on Facial Recognition.
[5] The Protocol will enter into force when ratified, accepted or approved by all Parties to Treaty ETS 108, or on 11 October 2023 if there are 38 Parties to the Protocol at this date.
[6] Ad hoc Committee on Artificial Intelligence (CAHAI), Feasibility Study.
[7] Another option would be to modernise existing binding legal instruments by adopting an additional protocol to the European Convention on Human Rights. This additional protocol would enshrine new or adapt existing human rights in relation to AI systems, and modernise existing instruments such as the Budapest Convention on Cybercrime and Convention 108+.

The Committee of Ministers of the CoE, at its 131st meeting in Hamburg on 21 May 2021, has decided that building on the results of the CAHAI, formal intergovernmental negotiations on a comprehensive, horizontal and legally binding instrument should be launched by May 2022[8].

While posing several challenges for legislators, the development of digital tools and artificial intelligence can also open up new opportunities for citizens and practitioners. Digital technologies can strengthen the protection and promotion of fundamental rights and democracy by making public participation more effective, public services more accessible, and helping in documenting cases of human rights violations and abuses. With appropriate safeguards and certification mechanisms in place, AI can contribute to the more effective work of law enforcement authorities, thereby improving the safety and security of citizens. Digital technologies, such as artificial intelligence, can facilitate making legal information and files more accessible. This leads to shorter judicial proceedings and an easier access to justice in general. However, law and justice must remain accessible also by non-digital means.

At present, existing legal instruments do not adequately safeguard certain essential principles relevant to the protection of human rights, democracy and the rule of law in the context of AI. Comprehensive legal provisions would be necessary to ensure sufficient human control and oversight over AI applications, and the technical robustness, transparency and explainability of AI applications. These principles must be observed especially where individuals are affected. If an impactful AI-enabled decision lacks the appropriate level of transparency and explainability, the implementation of a right cannot be adequately assessed and the right to remedy cannot be sufficiently ensured.

The Council of Europe and its Member States should make the utmost use of opportunities arising from the application of digital tools, algorithms or artificial intelligence. These applications can provide citizens with new solutions and opportunities in every aspect of their lives, including legal information services by the state, as well as judicial proceedings and alternative dispute resolution proceedings. This gives rise to the following questions: How can we deal with the potential harms of these applications? Which human rights are most at risk in the context of the use of digital tools and artificial intelligence in judicial proceedings? How can CoE Member States cooperate in eliminating human rights threats posed by the new technologies? How comprehensive should cooperation between the Member States be in this area? Lastly, how should national legislation tackle these challenges?

For more than 70 years, the CoE and its Member States have been committed to promoting the protection of human rights, the rule of law and democracy, values which are enshrined in the Convention. On 5 October, at the Conference *"Digital technology and artificial intelligence – New challenges for justice in Europe"*, we invite the ministers of the Member States to further this dialogue. The Conference intends to open a new chapter to discuss issues in the area of justice, such as the practical implementation of the ethical principles and recommendations already developed by CoE, the protection of human rights when using new technologies, as guaranteed in the Convention; and the handling of risks posed by these new technologies.

The Conference will consist of two plenary sessions. Mr Gregor Strojin, Chair of the CoE Ad hoc Committee on Artificial Intelligence (CAHAI) will open the morning plenary with his presentation on the *Use of e-devices in judicial proceedings in a Convention-compliant manner*. The afternoon plenary will begin with a presentation by Mr Xavier Ronsin, expert of the European Commission for the Efficiency of Justice (CEPEJ) and President of the Court of Appeal of Rennes (France) on the *Use of Artificial intelligence in judicial proceedings in a Convention-compliant manner*.

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[8] Decision CM/Del/Dec(2021)131/2b of the Committee of Ministers on Human rights in the digital age.