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IMPLICATIONS OF EU AI REGULATION FOR CRIMINAL JUSTICE**

Artificial intelligence (AI) is becoming part of the judiciary worldwide. The use of artificial intelligence is different from country to country. While AI has the potential to enhance efficiency, accuracy, and decision-making, it also raises significant ethical and legal concerns, particularly regarding the right to a fair trial. Compared to other judicial procedures, the criminal procedure has specifics and is the most vulnerable to the use of artificial intelligence due to power imbalance. Specifically, criminal procedure directly influences citizens' fundamental rights, including deprivation of liberty. Therefore, challenges identified in the use of artificial intelligence such as bias and discrimination have increased impact in criminal procedures. Beyond criminal procedure, artificial intelligence is used by investigative authorities before the criminal trial or even to prevent criminal acts, however, the same challenges and risks exist as for the criminal procedure. The artificial intelligence tools are developed by humans and inequalities that exist in the real criminal justice system will be reproduced in the AI tools.

The European Union (EU) and Council of Europe (CoE) are making efforts to develop a legal framework for the use of artificial intelligence in the judiciary. The article focuses on acts adopted by EU institutions on AI use in judiciary: European Parliament Resolution 2020/2016 (INI) Artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence and amending certain Union legislative acts (COM/2021/206 final) and CoE European Ethical Charter on the use of Artificial Intelligence in the judicial system and their environment.

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In the article author assessed the implications of using artificial intelligence in the criminal justice system, particularly focusing on whether such use jeopardizes the right to a fair trial. The analysis is structured around key concerns and explores potential advancements and the influence of the proposed EU Regulation on AI.

Keywords: artificial intelligence, technology, fundamental rights, bias, criminal procedure.

1. INTRODUCTION

There are different definitions of artificial intelligence, but for this article, the most relevant is one provided in the European Parliament's legislative resolution on the Proposal for a Regulation on Artificial Intelligence (AI Act).¹ The European Parliament defines AI systems as: "*a machine-based system designed to operate with varying levels of autonomy, that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments*".²

In the theory, there are different categorizations of the AI technologies in the justice system. Sourdin makes a distinction between supportive, replacement and disruptive technologies (Sourdin, 2018, p. 1117). According to Sourdin, supportive technologies assist in enhancing online information services related to justice processes. They may involve platforms or systems that provide access to legal information, court schedules, case updates, and other relevant data. Replacement technologies, replace physical court proceedings with online alternatives, such as video conferencing tools for conducting hearings, trials, and other legal proceedings remotely. Disruptive technologies fundamentally change traditional legal processes and procedures and inform judges' decisions by applying prediction models or in some countries online dispute resolutions for low-value civil claims.³ Reiling's categories include organization of information (i.e. the system used to organize and analyse vast amounts of data to recognize patterns and extract relevant information), provision of advice (i.e. chatbots, virtual assistants), and prediction of outcomes (predictive models) (Reiling, 2020, p. 8).

AI's capability to rapidly process and analyse large volumes of data presents significant opportunities for enhancing evidence-based decision-making (Baker & Robinson, 2021, p. 39). The advent of big data has revolutionised various sectors, including criminal justice. However, these advancements also raise unprecedented ethical and regulatory questions that need to be addressed to ensure the responsible and fair use of AI technologies.

¹ European Parliament legislative resolution of 13 March on the Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 – C9-0146/2021 – 2021/0106(COD).

² Article 3 of the Proposal for a Regulation on AI Act.

³ Small Claims Online – A Users Guide – Northern Ireland 2011. Available at: <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/small-claims-online-user-guide-v2.pdf> (2. 10. 2024).

Due to the various uses of AI in the justice systems, the author structures the discussion according to the different phases of the criminal procedure, from investigation to sentencing and post-conviction phase. This approach allows for a clear understanding of how AI impacts each stage, from investigation to sentencing and beyond and identifies challenges in its application. Furthermore, the author evaluates how the new EU Regulation addresses the challenges associated with using AI in the criminal justice system, specifically ethical considerations such as privacy, bias, accountability, transparency, and the overall impact on fundamental rights.

2. USE OF ARTIFICIAL INTELLIGENCE IN CRIMINAL JUSTICE

In the context of criminal justice, AI can be applied in various ways to support the system (Quattrococo, 2020, p. 3). The criminal justice system, particularly in the United States, has extensively integrated algorithmic and digital solutions across various phases of criminal proceedings. This integration impacts multiple aspects of the process, from investigation to sentencing and the execution of penalties and has the potential to enhance efficiency, accuracy, and fairness across various stages of criminal proceedings.

The European Union's structure and functioning, including the area of criminal law, have been significantly reformed after the Treaty of Lisbon, which entered into force on December 1, 2009. This Treaty marked a new era for EU criminal law by enhancing cooperation, harmonization, and integration across member states while upholding fundamental rights and the rule of law (Matić Bošković, 2021, p. 126).⁴ The European criminal justice system is underpinned by a comprehensive framework of guarantees designed to ensure fairness, transparency, and protection of fundamental rights throughout criminal proceedings (Matić Bošković, 2022, p. 32). As computational modelling and artificial intelligence (AI) become more integrated into this system, it is important to identify the aspects of criminal justice that may be most closely affected (Quattrococo, 2020, p. 23).

AI tools can enhance the efficiency and accuracy of collecting and analysing data during criminal investigations. Techniques such as facial recognition, data mining, and predictive analytics can expedite investigations and uncover patterns that might be missed by human investigators (Matić Bošković, 2020, p. 139). Tools such as predictive policing algorithms analyse data to forecast potential criminal activity and allocate police resources more effectively. For example, in crime detection, AI can analyse datasets to detect patterns indicative of fraudulent activities, helping to prevent and investigate financial crimes more effectively. As an example, there are machine learning algorithms used to detect anomalies in financial transactions, especially in the detection of money laundering, such as G.I.A.N.O.S. developed in Italy by the Italian Banking

⁴ Article 83 TFEU (Treaty on the Functioning of the European Union) introduced the concept of 'Euro-crimes', enabling the EU to establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension, such as terrorism, human trafficking, drug trafficking, and cybercrime. Article 82 TFEU facilitated judicial cooperation in criminal matters, allowing the EU to adopt measures for mutual recognition of judgments and judicial decisions, as well as cross-border cooperation.

Association (Costanzi, 2019, p. 8). The use of PredPol (Heaven, 2020), which predicts crime hotspots based on historical data, helps in strategic planning and crime prevention. The extensive use of data in criminal justice raises concerns about bias, privacy and data protection. Safeguarding individuals' personal information is essential to prevent misuse and protect civil liberties.

Related to judicial decision-making AI can assist judges by analysing past case law and identifying relevant precedents, streamlining the decision-making process and improving the consistency of judicial decisions. AI can assist judges by analysing past case law and identifying relevant precedents, streamlining the decision-making process and improving the consistency of judicial decisions. Specifically, legal research tools that utilize AI to quickly find relevant case law and legal principles. Risk assessment is one of the AI functionalities relevant to judicial decision-making (Bouchagiar, 2024, p. 76). Algorithms assist judges in making informed decisions regarding bail, sentencing, and parole by evaluating the risk of reoffending. These risk assessments are based on various data points, including criminal history, demographic information, and behaviour patterns. The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) algorithm, which is used to assess the risk of recidivism and inform sentencing decisions, exemplifies the application of AI in judicial processes (Brennan, Dieterich & Ehret, 2009, p. 21). The criticisms of COMPAS highlight significant concerns about racial bias and fairness in the use of AI in criminal justice. Although AI can help standardize sentencing by providing data-driven recommendations based on the specifics of the case and the defendant's background, algorithms can perpetuate existing biases in the data they analyse, leading to discriminatory outcomes (McDaniel & Pease, 2021, p. 46). Ensuring fairness and transparency in these systems is crucial to maintaining justice.

Concerning post-conviction monitoring, AI technologies can be used to monitor individuals on probation or parole, ensuring compliance with the terms of their release. Electronic monitoring systems can provide real-time data to authorities, such as GPS ankle monitors and automated reporting systems, which help ensure that offenders adhere to the terms of their release or probation (Matić Bošković & Kostić, 2019, p. 223).

AI systems can process information faster than humans, leading to quicker resolution of cases and investigations, while advanced algorithms can reduce human error, ensuring more precise outcomes in various criminal justice processes. By automating routine tasks, AI allows human resources to focus on more complex aspects of criminal justice. However, AI also brings up important ethical considerations such as data protection in the collection and processing of vast amounts of data, infringement of individual privacy rights by technologies like facial recognition, algorithmic bias in unfair risk assessments, and accountability for AI systems (Matić Bošković & Nenadić, 2021, p. 281). It is essential to ensure that these technologies are used in a manner that upholds the comprehensive framework of European guarantees, particularly those related to fair trial rights, privacy, non-discrimination, and transparency.⁵

⁵ Article 6 of the European Convention on Human Rights (ECHR) guarantees the right to a fair trial, which includes the right to be heard, the right to an impartial tribunal, and the right to legal representation. The use of AI must align with these principles to ensure that defendants' rights are not compromised.

3. EFFORTS TO REGULATE THE USE OF ARTIFICIAL INTELLIGENCE IN EUROPE

Efforts to regulate the use of AI in Europe have been underway to address various concerns regarding ethics, accountability, transparency, and the protection of fundamental rights. The European Commission's Strategy on Artificial Intelligence for Europe adopted in April 2018 emphasizes the significance of AI for Europe's advancement and outlines steps to stimulate investments, promote data availability, and ensure inclusive digital transformation.⁶ Following the Communication, the European Commission adopted the Coordinated Plan on Artificial Intelligence in December 2018, which outlines objectives such as fostering common efforts among Member States, promoting public-private practices, building the European data space, and enhancing understanding of AI security aspects.⁷ The Commission's Communication on Towards a Common European Data Space emphasized the socio-economic benefits of data-driven innovation, including technologies like AI and the Internet of Things (IoT).⁸ The 2019-2023 e-Justice Action Plan recognizes AI as a major development in ICT and emphasizes the need to further explore its implications in the field of justice.⁹

Some of the key initiatives and efforts to regulate the use of AI in the judiciary include the 2018 Council of Europe Commission for the Efficiency of Justice (CEPEJ) Ethical Charter on the use of AI in judicial Systems and their Environment,¹⁰ Ethical Guidelines for Trustworthy AI prepared by the European Commission's High-Level Expert Group on IA in April 2019,¹¹ The European Parliament Resolution from October 2021, and the European Commission's Proposal for a Regulation on AI from April 2021.

The CEPEJ Ethical Charter on the Use of AI in Judicial Systems underlines the importance of responsible AI use, particularly in ensuring compliance with fundamental rights and data protection regulations. The proliferation of ethical principles surrounding the

Article 14 of the ECHR prohibits discrimination, thus AI systems must be designed and implemented in a manner that avoids biases and ensures equal treatment for all individuals, regardless of race, gender, or other protected characteristics. AI systems used in criminal justice must comply with the General Data Protection Regulation (GDPR), ensuring that personal data is processed lawfully, fairly, and transparently. This includes safeguarding against unauthorized access and misuse of data.

⁶ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Artificial Intelligence for Europe*, 25 April 2018, COM (2018) 237 final.

⁷ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Coordinated Plan on Artificial Intelligence*, 7 December 2018, COM (2018) 795 final.

⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a common European data space*, 25 April 2018, COM (2018) 232 final.

⁹ 2019-2023 Action Plan European e-Justice, OJ 2019/C 96/05.

¹⁰ CEPEJ, European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, adopted at the 31st plenary meeting of the CEPEJ, Strasbourg, 3-4 December 2018.

¹¹ High-Level Expert Group on AI (AI HLEG), *Ethical Guidelines for Trustworthy AI*, 8 April 2019.

use of AI¹² Emphasizes the importance of addressing its implications in the administration of justice. The CEPEJ has developed five ethical principles specifically for AI use in the administration of justice, each aiming to uphold fundamental rights; non-discrimination; quality and security; transparency, impartiality and fairness; and under user control.

The fundamental rights principle emphasizes that the design and implementation of AI must be compatible with fundamental rights, as outlined in the European Convention on Human Rights and the Convention on the Protection of Personal Data.¹³ It stresses the need to prioritize human rights considerations in the development and deployment of AI systems within the legal context. The Charter advocates for ensuring that users are informed actors and maintain control over the choices made by AI systems. This principle aims to empower individuals interacting with AI technologies, ensuring transparency and accountability in decision-making processes. Transparency, impartiality, and fairness principles should ensure that data processing methods are accessible and understandable. It also emphasizes the need for external audits to be authorized, promoting accountability and fairness in the use of AI within the judicial systems. Efforts should be made to avoid discrimination between individuals and groups, as evidenced by the risk illustrated by the COMPAS tools, where biased data or algorithms may preserve unjust distinctions. Users of AI algorithms must disclose the choice made, data used, and assumptions employed to ensure effective legal protection and judicial review. Users must understand and control AI algorithms' outcomes. AI should not dictate decisions, and users must be able to deviate from algorithmic outcomes easily, as demonstrated by the Loomis case,¹⁴ where concerns were raised about the lack of transparency and control over the COMPAS tool's operation. Therefore, it is essential to implement rigorous oversight and accountability mechanisms to mitigate the risks.

The Ethical Charter acknowledges the diverse application of AI in the judicial context and encourages certain uses while advocating for a cautious approach and further research on other areas. The Charter supports certain uses of AI in the judiciary, including case-law enhancement by analysing and categorizing case-laws, access to law through AI chatbots, and the creation of strategic tools to analyse legal data. The Charter advises caution in certain AI applications, such as Online Dispute Resolution and recommends informing applicants whether their dispute resolution process is fully automated or involves human mediators, allowing them to make informed choices about their participation. Some uses of AI, such as judge profiling and anticipating court decisions, require further scientific research before widespread adoption. The Charter recognizes the sensitivity of individual profiling in the criminal justice context and anticipation of court decisions. It emphasizes the importance of ethical considerations and safeguards when using AI for profiling purposes, highlighting the potential impact on individual rights and due process.¹⁵

¹² UNESCO, (2021) Recommendation on the Ethics of Artificial Intelligence; OECD, (2019) Scoping the OECD AI Principles: Deliberations of the Expert Group on Artificial Intelligence at the OECD (AIGO).

¹³ Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, EST No. 108, as amended by the CETS amending protocol No. 223.

¹⁴ *Loomis v. Wisconsin*, 881 N.W.2d 749 (Wis. 2016) 137 S. Ct. 2290 (2017).

¹⁵ The Committee of Ministers of the Council of Europe adopted Recommendations Rec (2020)1 on the human rights impacts of algorithmic systems, along with Guidelines (Appendix to Recommendation

The Consultative Council of the Convention for the Protection of Individuals with regards to Automatic Processing, has recently issued new Guidelines on Artificial Intelligence and Data Protection to address the challenges posed by AI technologies to data protection and privacy rights.¹⁶ The Guidelines emphasize the importance of ensuring that AI systems comply with data protection principles such as purpose limitation, data minimization, transparency, and accountability.

The European Commission established the High-Level Expert Group on AI (AI HLEG) in June 2018 to support the implementation of the Strategy AI for Europe. In its first year, the AI HLEG issued the Ethics Guidelines for Trustworthy AI, which outlines ethical principles and values essential for ensuring the trustworthiness of AI systems. The document emphasized that trustworthy AI can be achieved by adhering to seven key requirements: human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; environmental and societal well-being; and accountability.¹⁷

The European Parliament also recognized the need to address AI issues and published the resolution on October 6, 2021.¹⁸ The Resolution address various aspects of artificial intelligence in criminal law and its use by police and judicial authorities. While acknowledging the potential benefits of AI applications in law enforcement, members of the European Parliament (MEP) express concerns about the risks of bias, discrimination, and privacy violations associated with their use. MEPs advocate for strong measures to ensure data security, privacy and protection against unauthorized access to personal data. In addition, the Resolution insists on caution against blind reliance on AI, emphasizing the importance of human intervention in decision-making processes, especially in legal or judicial matters. MEPs call for a ban on the use of AI to propose judicial decisions, highlighting the limitations of predictive policing and the need for human judgment. The Resolution calls for a permanent prohibition on AI mass scale scoring of individuals, particularly by law enforcement authorities, citing concerns about autonomy,

Rec(2020)1 to enable member states to fulfil their obligations in this regard. The key recommendations and principles outline in these documents are revision of legislative framework to ensure compliance with applicable laws and regulations; setting up legislative, regulatory and supervisory mechanisms; engagement of members states in dialogue with all relevant stakeholders; to build expertise and promote digital literacy to enable better understanding of algorithmic systems. The Guidelines provide detailed guidance on data management, analysis, and modeling, transparency, accountability, effective remedies, precautionary measures, research, innovation, and public awareness, aiming to support member states in fulfilling their obligation and promoting the responsible and ethical use of algorithmic systems in alignment with human rights principles.

¹⁶ Guidelines has been adopted on January 25, 2019. Available at: <https://rm.coe.int/guidelines-on-artificial-intelligence-and-data-protection/168091f9d8> (1. 10. 2024).

¹⁷ These requirements for trustworthy AI are further elaborated in the Communication of the Commission Building Trust in Human-Centric Artificial Intelligence, 8 April 2019, COM (2019) 168 final. This communication emphasised the importance of building trust in Ai systems prioritising human values, rights, and well-being, and promoting ethical and responsible AI development and deployment across Europe.

¹⁸ European Parliament Resolution 2020/2016 (INI) Artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters.

non-discrimination, and fundamental rights. Additionally, MEPs express apprehension regarding the law enforcement and intelligence services' use of private facial recognition databases.

The European Commission's Regulation on AI Act is a significant legislative proposal aimed at regulating the development, deployment, and use of AI systems within the European Union. The AI Act seeks to establish a harmonised regulatory framework for AI systems across the EU, with the overarching goal of promoting trustworthy and ethical AI while ensuring the protection of fundamental rights, safety and security. The Regulation categorises AI systems into different risk levels based on their potential to cause harm (unacceptable risk, high risk and limited risk). AI systems classified as high risk must comply with specific requirements, such as ensuring the quality and integrity of training data and documentation; providing transparency about the capabilities, limitations, and purposes of the AI system; ensuring the accuracy, robustness and reliability of the AI system; implementing mechanisms for human oversight and intervention; and maintaining documentation and records to demonstrate compliance with regulatory requirements.

The European Commission has identified in the Annex of the proposal for a Regulation on AI Act certain AI systems used in the administration of justice as high risk due to their potential to cause considerable harm to fundamental rights, such as the right to a fair trial and effective remedy, as result of issues like opaqueness and unfair bias. These high-risk AI applications include systems that assist judicial staff in researching, interpreting facts and the law, and applying the law to specific cases. However, systems not directly linked to adjudication, such as those involving anonymization of judgements or document handling, are not considered high-risk.

In response to these concerns, the European Union is prioritizing the regulation of AI systems for courts throughout their design, development, and use stages. The aim is to create trustworthy applications that can be safely employed by court users without jeopardizing their rights. This involves establishing binding standards and regulations to ensure transparency, fairness, and accountability in the development and deployment of AI systems within the judicial system. However, there are examples from other non-EU countries where the lack of adherence to binding standards has compromised litigants' rights, despite significant investment in the research and development of AI solutions. As it is mentioned COMPAS has faced challenges related to bias. The algorithm excluded race to prevent bias but left the poverty rate, which also led to bias (Angwin *et al.*, 2022, p. 270). The COMPAS example highlights the need for constant monitoring of AI solutions and its result, to enable immediate action if there are challenges in application.

4. CONCLUSION

The integration of AI into the criminal justice system has the potential to significantly enhance the efficiency, quality and predictability of various phases of the criminal procedure. However, it also raises several concerns, particularly regarding fundamental rights such as the right to a fair trial, personal data protection, and issues of discrimination and biases.

The opaque nature of many AI algorithms can undermine the transparency required for a fair trial, so defendants may not understand how an AI system reached its conclusions, limiting their ability to challenge potentially biased or inaccurate results. The extensive use of personal data in AI systems can pose significant privacy risks, especially if data is not adequately protected. AI systems that aggregate and analyse data from multiple sources may inadvertently expose sensitive personal information.

The draft Regulation on AI adopted by the European Parliament represents a significant step towards establishing a comprehensive legal framework for AI in the EU. By classifying AI systems, particularly those used in critical areas like criminal justice, as high-risk and subjecting them to stringent requirements, the Regulation aims to ensure that AI technologies are developed and used in ways that are safe, fair, and trustworthy. The emphasis on transparency, accountability, and human oversight reflects the EU's commitment to protecting fundamental rights while fostering innovation and competitiveness in the AI sector.

Specifically, the draft Regulation emphasizes the importance of fairness and non-discrimination in AI applications, particularly in criminal justice. AI systems must be designed and used in ways that prevent bias and discrimination. Regular audits and assessments are required to ensure that AI systems comply with these principles. According to the draft Regulation AI systems in criminal justice must be subject to human oversight to ensure that decisions made by or with the assistance of AI are fair and just, while accountability mechanisms must be established to address any errors or misuse of AI systems in criminal justice. The draft Regulation mandates that AI systems in criminal justice be transparent and explainable. This means that decisions made by AI must be understandable to the affected individuals and the public. Clear documentation and communication are required to ensure that users and stakeholders are aware of how AI systems operate and the basis for their decisions.

The draft AI Regulation by the European Union is anticipated to play a crucial role in ensuring the safe and ethical use of AI in the criminal justice system. The draft Regulation is designed to address several key concerns and provide a comprehensive framework for the responsible deployment of AI technologies.

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