

BOOK OF PROCEEDINGS

**INTERNATIONAL
CONFERENCE ON SOCIAL
AND HEALTHCARE STUDIES**

International Conference on Social and Healthcare Studies

DAY 1:

ARTIFICIAL INTELLIGENCE AND CHALLENGES FOR MODERN SOCIETY: ECONOMIC, SOCIAL, LEGAL AND
TECHNOLOGICAL PERSPECTIVE

DAY 2:

HEALTH-CARE IN THE ERA OF ARTIFICIAL INTELLIGENCE

Book of Proceedings

EDITORS:

Valon Murati, Riaz Agahi, Avni H. Alidemaj, Filipos Ruxho

The conference aims to create a forum for scholars from different academic fields of economics, business, social science, IT and healthcare to exchange and present their research. The main objective is to further develop critical empirical research and theoretical work in regard to possibilities that will create and challenges that will pose to modern society the application of artificial intelligence.

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Valon Murati, Riaz Agahi, Avni H. Alidemaj, Filipos Ruxho

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ARTIFICIAL INTELLIGENCE IN EUROPEAN CRIMINAL LAW PERSPECTIVE

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ABSTRACT

Many official documents on artificial intelligence (AI) have been adopted by the European Union. The contribution deals with AI in European criminal law perspective. It focuses on the most important steps of the European Union in this field, namely the Directive 2016/680 on Protection of Personal Data Used by Police and Criminal Justice Authorities of 2016, the European Ethical Charter on the Use of AI in Judicial Systems of 2018, the Resolution on AI in Criminal Law and its Use in Criminal Matters of 2021 and the Proposal for a Regulation on Harmonised Rules on AI (AI Act) of 2021.

Keywords: *artificial intelligence (AI), criminal law, criminal proceedings, European criminal law*

INTRODUCTION

Artificial intelligence (hereinafter “AI”) – defined by the Cambridge Dictionary as “the use or study of computer systems or machines that have some of the qualities that the human brain has, such as the ability to interpret and produce language in a way that seems human, recognize or create images, solve problems, and learn from data supplied to them” (Cambridge Dictionary, 2023) – is a fast evolving area that can bring a wide array of benefits. As noted by the European Commission, by improving prediction, optimising operations and resource allocation, and personalising service delivery, the use of artificial intelligence can support socially and environmentally beneficial outcomes and provide key competitive advantages to companies and the European economy. Such action is especially needed in high-impact sectors, including climate change, environment and health, the public sector, finance, mobility, home affairs and agriculture. In the opinion of the European Commission “it is in the Union interest to preserve the European Union’s technological leadership and to ensure that Europeans can benefit from new technologies developed and functioning according to Union values, fundamental rights and principles” (European Commission, 2021).

Many official documents on AI have been adopted by the European Union, for example, the Building Trust in Human-Centric Artificial Intelligence of the European Commission of 8 April 2019 [COM(2019) 168], the Artificial Intelligence – a European Approach to Excellence and Trust of the European Commission of 19 February 2020 [COM(2020) 65] and the Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies of the European Parliament as resolution of 20 October 2020 [2020/2012(INL)]. Since this contribution is focused on criminal law perspective at the level of the European Union, it is focused on criminal law related documents, namely:

- 1.The Directive 2016/680 on Protection of Personal Data Used by Police and Criminal Justice Authorities of 2016,
- 2.The European Ethical Charter on the Use of AI in Judicial Systems of 2018,
- 3.The Resolution on AI in Criminal Law and its Use in Criminal Matters of 2021, and
- 4.The Proposal for a Regulation on Harmonized Rules on AI (AI Act) of 2021.

1. THE DIRECTIVE 2016/680 ON PROTECTION OF PERSONAL DATA USED BY POLICE AND CRIMINAL JUSTICE AUTHORITIES OF 2016

The protection of natural persons in relation to the processing of personal data is a fundamental right. The Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union provide that everyone has the right to the protection of personal data [Article 8(1) of the Charter, Article 16(1) of the Treaty].

In 2016 was adopted the Directive 2016/680 of the European Parliament and of the Council on the Protection of Natural Persons With Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties (hereinafter the "Directive 2016/680 on Protection of Personal Data Used by Police and Criminal Justice Authorities" or the "Directive"). The Directive establishes a comprehensive framework to ensure a high level of data protection, while taking into account the specific nature of the police and criminal justice field. From a European Union perspective, it contributes to increased trust and facilitates co-operation in the fight against crime in Europe, by harmonising the protection of personal data by law enforcement authorities in the European Union Member States and Schengen countries. It is a part of data protection reform of the European Union, along with the General Data Protection Regulation, i.e. the Regulation (EU) 2016/679 on the Protection of Natural Persons With Regard to the Processing of Personal Data and on the Free Movement of Such Data of 2016 (also known as "GDPR") and the Regulation (EU) 2018/1725 on the Protection of Natural Persons With Regard to the Processing of Personal Data by Institutions, Bodies, Offices and Agencies of the European Union.

As pointed out by Gasper, it should be underlined that data processing in the European Union, as regards the police and criminal justice co-operation context, was a field outside the European Union. Practically all member States of the European Union have bilateral agreements governing the exchange of personal data for law enforcement related purposes. On the other hand, the Directive 2016/680 on Protection of Personal Data Used by Police and Criminal Justice Authorities had to maintain a careful balance between, on the one hand, the requirements of police and criminal justice work and existing bilateral agreements, and, on the other hand, the requirement for an increased level for personal data protection (Gasper, 2021).

The Directive 2016/680 on Protection of Personal Data Used by Police and Criminal Justice Authorities lays down the rules relating to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or

prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security [Article 1(1) of the Directive]. In accordance with the Directive, the Member States of the European Union shall, first, protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data, and, second, ensure that the exchange of personal data by competent authorities within the European Union, where such exchange is required by the European Union or Member State law, is neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data [Article 1(2) of the Directive]. On the other hand, the Directive shall not preclude Member States from providing higher safeguards than those established in this Directive for the protection of the rights and freedoms of the data subject with regard to the processing of personal data by competent authorities [Article 1(3) of the Directive].

As regards the scope of the Directive, it applies to the processing of personal data by competent authorities for the above-mentioned purposes. The Directive applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system [Article 2(1)(2) of the Directive]. On the other hand, the Directive does not apply to the processing of personal data, first, in the course of an activity which falls outside the scope of European Union law, and, second, by the institutions, bodies, offices and agencies of the European Union [Article 2(3) of the Directive].

For the purposes of the Directive, the term personal data shall mean any information relating to an identified or identifiable natural person ("data subject"); in this context an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. As regards the term processing, it shall mean any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

The Directive introduced the *principles relating to processing of personal data*. The Member States of the European Union shall provide for personal data to be [Article 4(1) of the Directive]:

- processed lawfully and fairly,
- collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes,

- adequate, relevant and not excessive in relation to the purposes for which they are processed, accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay,
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they are processed, and
- processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

As regards implementation of the Directive into the national legal orders of the Member States of the European Union, in principle, its provision have been implemented. However, many States were late, as regards deadline for implementation (Custers, Sears, Dechesne, Georgieva, Tani, van der Hof, 2021). For example, in the Slovak Republic they have been implemented into, *among others*, the national Act No. 171/1993 Coll. on the Police Force (zákon č. 171/1993 Z. z. o Policajnom zbore).

2.THE EUROPEAN ETHICAL CHARTER ON THE USE OF ARTIFICIAL INTELLIGENCE IN JUDICIAL SYSTEMS OF 2018

In 2018 was introduced the *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment* by the European Commission for the Efficiency of Justice. It is understood as one of the most relevant documents in relation to AI (Sourdin, 2021; Molbæk-Steensig, Quemy, 2023). The Charter is intended for public and private stakeholders responsible for the design and deployment of AI tools and services that involve the processing of judicial decisions and data. It also concerns public decision-makers in charge of the legislative or regulatory framework, of the development, audit or use of such tools and services. The use of such tools and services in judicial systems *seeks to improve the efficiency and quality of justice*. Judicial decision processing by AI, according to their developers, is likely, in civil, commercial and administrative matters, to help improve the predictability of the application of the law and consistency of court decisions, subject to compliance with the principles set out below. In *criminal matters*, their use must be considered with the greatest reservations to prevent discrimination based on sensitive data, in conformity with the guarantees of a fair trial.

Acknowledging the increasing importance of AI in modern societies, and the expected benefits when it will be fully used at the service of the efficiency and quality of justice, were introduced 5 fundamental principles entitled *European Ethical Charter on the use of Artificial Intelligence in the Judicial Systems and Their Environment*, namely:

1. *Principle of respect for fundamental rights*: ensure that the design and implementation of AI tools and services are compatible with fundamental rights,
2. *Principle of non-discrimination*: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals,
3. *Principle of quality and security*: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models conceived in a multi-disciplinary manner, in a secure technological environment,
4. *Principle of transparency, impartiality and fairness*: make data processing methods accessible and understandable, authorise external audits, and
5. *Principle "under user control"*: Preclude a prescriptive approach and ensure that users are informed actors and in control of their choices.

On the one hand, as pointed out by *Molbæk-Steensig* and *Quemy*, the above-mentioned principles through their simplicity cover the needs for AI development for judicial system quite well; this simplicity also results in a lack of details and the Charter is missing both the legal-philosophical clarity (*Molbæk-Steensig, Quemy, 2023*). On the other hand, each above-mentioned principle of the Charter is underpinned by detailed statements to its interpretation and application in a judicial setting.

As regards application of the Charter, their principles should be subject to regular application, monitoring and evaluation by public and private actors, with a view to continuous improvement of practices. In this respect, it is desirable that a regular review of the implementation of the principles of the Charter be made by these actors, explaining, where appropriate, the reasons for non-implementation or partial implementation, accompanied by an action plan to introduce the necessary measures.

3. THE RESOLUTION ON ARTIFICIAL INTELLIGENCE IN CRIMINAL LAW AND ITS USE IN CRIMINAL MATTERS OF 2021

AI and autonomous systems, together with other new technology trends have gained the attention of legislators, including the European Parliament (*Borges, Sorge, 2022*). In several documents, the European Parliament has shown the need for action at the European Union level. The Member States European Union, by the European Parliament, demanded strong safeguards when AI tools are used in practice by the police (*Nikolinakos, 2023*).

In 2021 the European Parliament introduced the *Resolution on Artificial Intelligence in Criminal Law and its Use by the Police and Judicial Authorities in Criminal Matters*. At the beginning, the European Parliament stated that digital technologies in general, and the proliferation of data processing and analytics enabled by AI in particular, bring with them extraordinary *promises*, but also *risks*. Whereas AI development has made a big leap forward in recent years, making it one of the strategic technologies of the 21st century, with the potential to generate substantial benefits in efficiency, accuracy, and convenience, and thus

bringing positive change to the European economy and society, but AI has made also great risks for fundamental rights and democracies based on the rule of law.

For purposes of criminal law, the *Resolution on Artificial Intelligence in Criminal Law and its Use by the Police and Judicial Authorities in Criminal Matters* can be marked of a crucial European Union document in criminal justice development. The European Parliament, by the Resolution, highlighted the main issues of the AI in criminal law context, *among others* (in total 36 points; below are shortened statements):

-Point No. 1: As processing large quantities of personal data is at the heart of AI, the right to the protection of private life and the right to the protection of personal data *apply to all areas of AI*. Processing of personal data should be lawful and fair, the purposes of processing should be specified, explicit and legitimate, processing should be adequate, relevant and not excessive in relation to the purpose for which is it processed. Possible identification of individuals by an AI application using data that was previously anonymised, should be prevented.

-Point No. 2: All AI solutions for law enforcement and the judiciary also *need to fully respect* the principles of human dignity, non-discrimination, freedom of movement, the presumption of innocence and right of defense, including the right to silence, freedom of expression and information, freedom of assembly and of association, equality before the law, the principle of equality of arms and the right to an effective remedy and a fair trial.

-Point No. 3: The speed at which AI applications are being developed around the world does not allow for an exhaustive listing of applications. Given the role and responsibility of police and judicial authorities, and the impact of decisions they take for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, *the use of AI applications has to be categorised as high-risk* in instances where there is the potential to significantly affect the lives of individuals.

-Point No. 4: Any AI tools either developed or used by law enforcement or the judiciary *should be safe, robust, secure and fit for purpose*.

-Point No. 5: The positive contribution of certain types of AI applications to the work of law enforcement and judicial authorities across the European Union is welcomed, for example, *the enhanced case-law management* achieved by tools allowing for additional search options.

-Point No. 11: The European Parliament takes note of the risks related, in particular, to data leaks, data security breaches and unauthorised access to personal data and other information related to, for example, criminal investigations or court cases that is processed by AI systems. It underlines that security and safety aspects of AI systems used in law enforcement and by the judiciary *need to be considered carefully and be*

sufficiently robust and resilient to prevent the potentially catastrophic consequences of malicious attacks on AI systems.

-Point No. 14: It is essential, both for the effectiveness of the exercise of defence rights and for the transparency of national criminal justice systems, that a specific, clear and precise *legal framework regulates the conditions, modalities and consequences of the use of AI tools* in the field of law enforcement and the judiciary.

-Point No. 16: In judicial and law enforcement contexts, the decision giving legal or similar effect *always needs to be taken by a human*.

-Point No. 18. Law enforcement and judicial authorities should identify and assess the areas where some tailor-made AI solutions *might be beneficial* and to exchange best practices on AI deployment.

4. THE PROPOSAL FOR A REGULATION ON HARMONISED RULES ON ARTIFICIAL INTELLIGENCE (ARTIFICIAL INTELLIGENCE ACT) OF 2021

In 2021 the European Commission introduced the Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act). It is the world's first attempt to regulate AI systems in a horizontal way. In contrast to other legislation of the European Union, it is not sector-specific document, but it relates to the use of AI in general (Veale, Zuiderveen Borgesius, 2021; Ebers, 2023). The Proposal responds to explicit requests from the European Parliament and the European Council, which have repeatedly expressed calls for legislative action to ensure a well-functioning internal market for AI systems where, both benefits and risks of AI, are adequately addressed at the European Union level. It supports the objective of the European Union being a global leader in the development of secure, trustworthy and ethical AI.

The primary objective of the Proposal for a Regulation Laying Down Harmonised Rules on AI is to ensure the proper functioning of the internal market by setting harmonised rules in particular on the development, placing on the European Union market and the use of products and services making use of AI technologies or provided as stand-alone AI systems. In details, the European Commission puts forward the proposed regulatory framework on AI with the following specific objectives:

- ensure that AI systems placed on the European Union market and used are safe and respect existing law on fundamental rights and European Union values,
- ensure legal certainty to facilitate investment and innovation in AI,
- enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems, and

-facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.

The Proposal sets harmonised rules for the development, placement on the market and use of AI systems in the Union following a proportionate risk-based approach. According to its draft version of proposed regulation, the Regulation should lay down (Article 1 of the Proposal for a Regulation Laying Down Harmonised Rules on AI):

- harmonised rules for the placing on the market, the putting into service and the use of AI systems in the European Union,
- prohibitions of certain artificial intelligence practices,
- specific requirements for high-risk AI systems and obligations for operators of such systems,
- harmonised transparency rules for AI systems intended to interact with natural persons, emotion recognition systems and biometric categorisation systems, and AI systems used to generate or manipulate image, audio or video content, and
- rules on market monitoring and surveillance.

It should be noted that the Drafted Regulation borrows two elements from the General Data Protection Regulation of 2016, i.e. the Regulation (EU) 2016/679 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data. The Proposal of Regulation has extraterritorial effect and turnover based fines. Thanks to those elements, the GDPR has become an international regulatory framework. Organisations that market AI systems to users in the European Union would be, if adopted, within scope of the Regulation, regardless of where the provider is located. The Draft Regulation extends the level of fines and territorial scope further, in that it covers output produced by the system that is used in the European Union (McFadden, Jones, Taylor, Osborn, 2021).

As regards criminal law, two crucial aspects of the Proposal for a Regulation Laying Down Harmonised Rules on AI should be mentioned, namely:

- The use of AI systems for 'real-time' remote biometric identification of natural persons in publicly accessible spaces for the purpose of law enforcement. It is considered particularly intrusive in the rights and freedoms of the concerned persons, to the extent that it may affect the private life of a large part of the population, evoke a feeling of constant surveillance and indirectly dissuade the exercise of the freedom of assembly and other fundamental rights. In addition, the immediacy of the impact and the limited opportunities for further checks or corrections in relation to the use of such systems operating in 'real-time' carry heightened risks for the rights and freedoms of the persons that are concerned by law enforcement activities. The use of those systems for the purpose of law enforcement should therefore be prohibited,

except in three exhaustively listed and narrowly defined situations, where the use is strictly necessary to achieve a substantial public interest, the importance of which outweighs the risks. Those situations involve the search for potential victims of crime, including missing children; certain threats to the life or physical safety of natural persons or of a terrorist attack; and the detection, localisation, identification or prosecution of perpetrators or suspects of the criminal offences referred to in the Framework Decision 2002/584/JHA on the European arrest warrant.

- Actions by law enforcement authorities involving use of AI systems. They are characterised by a significant degree of power imbalance and may lead to surveillance, arrest or deprivation of a natural person's liberty. In particular, if the AI system is not trained with high quality data, does not meet adequate requirements in terms of its accuracy or robustness, or is not properly designed and tested before being put on the market or otherwise put into service, it may single out people in a discriminatory or otherwise incorrect or unjust manner. The high-risk AI systems should include in particular AI systems intended to be used by law enforcement authorities for individual risk assessments, polygraphs and similar tools or to detect the emotional state of natural person, to detect 'deep fakes', for the evaluation of the reliability of evidence in criminal proceedings, for predicting the occurrence or reoccurrence of an actual or potential criminal offence based on profiling of natural persons, or assessing personality traits and characteristics or past criminal behaviour of natural persons or groups, for profiling in the course of detection, investigation or prosecution of criminal offences, as well as for crime analytics regarding natural persons. AI systems specifically intended to be used for administrative proceedings by tax and customs authorities should not be considered high-risk AI systems used by law enforcement authorities for the purposes of prevention, detection, investigation and prosecution of criminal offences.

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