

## MILESTONE IN AI: CHARTER ON ETHICS REGARDING USE OF AI BY JUDICIAL SYSTEMS RELEASED BY COUNCIL OF EUROPE

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On December 3, 2018, the development of legal rules for Artificial intelligence (AI) reached a major milestone with the release of the *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment*.<sup>1</sup> Adopted by the European Commission for the Efficiency of Justice (CEPEJ),<sup>2</sup> part of the Council of Europe,<sup>3</sup> the Charter represents a major step towards reaching the proper balance between technical innovation and the protection of fundamental rights. AI has the potential to improve efficiency, access to justice, and quality of decision-making in the judicial system. However, AI technology is not perfect—researchers have already uncovered examples of bias and unintended consequences in AI algorithms.<sup>4</sup>

Using AI methodologies in a legal setting can present policy makers with an ethical dilemma of how to balance the rights of those impacted by AI with the interest in judicial efficiency. In an effort to tackle this dilemma, the Charter presents five core principles for governments and institutions to consider when drafting laws and policies regarding the use of AI in the legal system.

### THE 5 CORE PRINCIPLES

Put in their simplest form, the five principles can be summarized as follows:<sup>5</sup>

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<sup>1</sup> *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment*, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) (2018), <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> [hereinafter Ethical Charter].

<sup>2</sup> COUNCIL OF EUROPE - EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), <https://www.coe.int/en/web/cepej/> (last visited Apr. 26, 2019). It is important to distinguish between the Council of Europe, a non-governmental international organization, and the European Council, a governing arm of the European Union (EU) that directs the EU's general political direction and priorities. *See European Council*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/institutions-bodies/european-council\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en) (last visited Apr. 26, 2019). Similarly, a distinction should be noted between the CEPEJ, as part of the non-governing Council of Europe, and the EU's European Commission, which enacts and enforces EU policies and budgets. *European Commission*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/institutions-bodies/european-commission\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en) (last visited Apr. 26, 2019).

<sup>3</sup> *Who We Are*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/about-us/who-we-are> (last visited Apr. 26, 2019).

<sup>4</sup> *See, e.g.*, Joy Buolamwini & Timnit Gebru, 81 Proc. of Machine Learning Res. 77 (2018).

<sup>5</sup> Ethical Charter, *supra* note 1.

1. *Respect for Fundamental Rights*  
AI rules should be “ethical-by-design” keeping human rights in mind, like the rights guaranteed by the European Convention on Human Rights. For example, maintaining the right to access a judge, the right to a fair trial, the rule of law, and the principle of judicial independence.
2. *Non-Discrimination*  
Efforts must be made to avoid developing, reproducing, or intensifying discrimination against protected classes of individuals. This includes both the protection of “sensitive data,” which directly relates to the status of a protected class (such as ethnicity, race, or religion), and also remedial action to limit or neutralize the risk of discriminatory AI use of aggregate data or proxies for sensitive data.
3. *Quality & Security*  
Ensuring the quality and security of the algorithms requires a two-pronged strategy: first, engaging interdisciplinary teams to develop effective AI tools, with opportunities for feedback on the effectiveness of ethical safeguards; and, second, designing traceable features to ensure no modification of the software has occurred so that the integrity and intangibility of the AI remains intact.
4. *Transparency*  
This is particularly remarkable and important principle: the requirement that algorithms are transparent so that they can be audited for fairness and impartiality. Recently, there has been a lot of discussion about the potential benefits<sup>6</sup> and limitations<sup>7</sup> of making AI more transparent, but to expressly require transparency for AI tools to be ethical is a major development. The Charter notes that this may require new legal rules to allow for full technical transparency—particularly, modification to trade secrets rules to allow for a system of open source code and documentation. Transparency could also be accomplished by “explainable AI”—or software capable of explaining in plain language, for example, how the results were reached, the nature of the services, and the risk of error.

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<sup>6</sup> See, e.g., Scott Barsotti, *Explainable AI: What Happens Inside the Black Box*, CARNEGIE MELLON UNIVERSITY: NEWS (Oct. 15, 2018), <https://www.cmu.edu/news/stories/archives/2018/october/explainable-ai.html>.

<sup>7</sup> See, e.g., Rudina Seseri, *The Problem with ‘Explainable AI’*, TECH CRUNCH (June 14, 2018), <https://techcrunch.com/2018/06/14/the-problem-with-explainable-ai/>.

#### 5. *Maintain User Control*

Finally, informed actors (the “users”—here, mainly the judges, mediators, arbitrators, or other legal authorities using the AI tools) must be allowed to maintain control of the data. This principle includes the ability for judicial professionals to review AI decisions and the data used to reach conclusions, and to not be bound by the decisions produced by AI algorithms. Implementing computer literacy programs may be necessary so that courts, as users, can achieve this degree of control.

### THE CHARTER, IN CONTEXT

The Charter is significant as a first effort to develop ethical guidelines for the use of AI in the judicial system. While the Charter may be aspirational in nature, its practical relevance should not be understated. Though the Charter is not legally binding, it is no less important as a tool for governments—in Europe and beyond—to reference when drafting laws, rules, and policies regarding law-related AI applications. That said, prior publications by the Council of Europe have been influential in the legal rules adopted by the European Union, even if only implicitly.

While focused on the legal systems of its member states, the five principles laid out in the Charter may also provide a starting point for U.S. institutions to evaluate the regulation of AI algorithms used by state and federal legal systems. Many of the ethical considerations arising from the use of AI tools will remain the same, and already U.S. courts are called upon to evaluate the tools that they and law enforcement use in the administration of justice.<sup>8</sup> The general principles outlined in the Charter can be a guide—either directly or as a catalyst for discussion—for considering how U.S. law should react to the use of AI tools by the judicial system.

### AN EMPIRICAL STUDY ON RECOMMENDED USES OF JUDICIAL AI TOOLS

Included as part of the Charter is an extensive empirical study that examines the use of AI in judicial systems and decision-making. The results of this study appear to have informed many of the principles espoused in the Charter. The study critically analyzed the characteristics of AI as applied to judicial decision-making, the capabilities and limitations of AI software, specific considerations

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<sup>8</sup> See, e.g., Vyacheslav Polonski, *AI is Convicting Criminals and Determining Jail Time, But is it Fair?*, WORLD ECONOMIC FORUM (Nov. 19, 2018), <https://www.weforum.org/agenda/2018/11/algorithms-court-criminals-jail-time-fair/>; Randy Rieland, *Artificial Intelligence is Now Used to Predict Crime. But is it Biased?*, SMITHSONIAN MAGAZINE (Mar. 5, 2018), <https://www.smithsonianmag.com/innovation/artificial-intelligence-is-now-used-predict-crime-is-it-biased-180968337/>.

for civil and criminal cases, and implications for data protection in predominantly, if not exclusively, Western legal systems. By including this study with its text, the Charter paints a broader picture of the realities of AI tools used by courts and illustrates the necessity of the five principles adopted by the Charter.

The study was also followed by two additional appendices: a checklist for integrating AI tools in the judicial system and a list of recommendations for how AI is used by the judiciary, summarized below.<sup>9</sup>

Encouraged Uses	Uses Requiring Considerable Precautions	Uses Requiring Additional Scientific Studies	Uses Subject to Extreme Reservations
<ul style="list-style-type: none"> <li>• <b>Case-law Enhancement:</b> tools assisting in case law searches and linking to primary and secondary sources of law</li> <li>• <b>Access to Law:</b> chatbots to facilitate information gathering and document template generation</li> <li>• <b>Strategic Tools:</b> these facilitate efficiency in the administration of justice, including human resources and budgeting goals</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Drawing Up Scales in Civil Disputes:</b> statistical analysis of causative factors in judicial decisions, requires additional information to meaningfully assess the data</li> <li>• <b>Alternative Dispute Resolution and Online Dispute Resolution:</b> advice and decision by virtual agents require the opportunity for review by humans as final decision-makers</li> <li>• <b>AI in Criminal Investigations:</b> real time predictions of where crime is likely to occur have to be balanced against "performative effect" and feedback loops; further studies of these algorithms are needed</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Judge Profiling:</b> tools quantifying factors likely to impact judicial decisions should not be used to give an advantage to litigants, but <i>may</i> assist judges reviewing their own decision-making; further research is needed</li> <li>• <b>Anticipating Court Decisions:</b> the output of these tools is an outcome which does not reveal the underlying reasons or analysis for it; the output's reliability is limited by bias in the data; there is a risk that these tools become unresponsive to amendments, reversals, or developments in the law</li> </ul>	<ul style="list-style-type: none"> <li>• <b>AI for Criminal Profiling:</b> using predictive tools to foresee likelihood of criminal offense or repeat offense has been shown to be biased, disproportionately impacting minority populations in a discriminatory and deterministic fashion</li> <li>• <b>Quantity-Based Norms:</b> using scales to "lock in" a legal answer based on precedent gives rise to the clear danger of crystalizing case law and hindering judicial independence</li> </ul>

## CONCLUSION & KEY TAKEAWAYS

The Charter provides a guide for where to start in thinking about these issues and what overarching principles may ultimately be incorporated into law. It also makes clear that inclusion of and input from the judiciary will be essential to strike the proper balance between effective AI tools and the protection of legally-protected and guaranteed rights. To make these determinations, courts must continue to learn about the legal, technical, and ethical questions arising from AI.

<sup>9</sup> Ethical Charter, *supra* note 1, at 54-55.