

COUNCIL OF EUROPE

AD HOC COMMITTEE ON ARTIFICIAL INTELLIGENCE (CAHAI)

Artificial intelligence (AI) has the potential to promote human prosperity and individual and societal well-being by enhancing progress and innovation. At the same time, concerns are rising in respect of harm resulting from different types of AI applications and their potential negative impact on human beings and society. Discrimination, the advent of a surveillance society, the weakening of human agency, information distortion, electoral interference, digital exclusion and potentially harmful attention economy, are just some of the concrete concerns that are being expressed.

It is therefore crucial that the Council of Europe's standards on human rights, democracy and the rule of law are effectively anchored in appropriate legislative frameworks by member States. While the existing general international and regional human rights instruments, including the European Convention on Human Rights (ECHR), remain applicable in all areas of life, including online and offline and regardless of the technology, a Council of Europe legal response, aimed at filling legal gaps in existing legislation and tailored to the specific challenges raised by AI systems should be developed, based on broad multi-stakeholder consultations.

The above-mentioned risks raised by the use of AI systems to facilitate or amplify unjust bias can pose a threat to the right to liberty and security combined with the right to a fair trial when these systems are used in situations where physical freedom or personal security is at stake (such as justice and law enforcement). For instance, some AI systems used to predict recidivism rely on characteristics that the suspect shares with others (such as address, income, nationality, debts, employment), which raises concerns as regards maintaining an individualised approach to sentencing and other fundamental aspects of the right to a fair trial. In addition, an AI system's opacity may render it impossible to understand the reasoning behind its outcomes, hence making it difficult or impossible to ensure the full respect of the principle of equality of arms, to challenge the decision, seek effective redress or have an effective remedy. If applied responsibly and with prudence, however, certain AI applications can also make the work of justice and law enforcement professionals more efficient and hence have a positive impact on these rights. This necessitates further efforts to build the capacities of judicial actors in their knowledge and understanding of AI systems and their application.

AI systems can also affect the rule of law. When used responsibly, AI systems can be used to increase the efficiency of governance, including legal institutions such as the courts. Furthermore, AI systems can help agencies to identify corruption within public entities.

The European Court of Human Rights (ECtHR) has not yet developed any specific case law on AI systems, hence the CAHAI could not rely on any ECtHR decisions specifically on AI technology. But in *Sigurður Einarsson and others v. Iceland*, a prosecuting authority used statistical data processing techniques to process large amounts of information and establish evidence in an economic and financial case.

The question raised in this case concerned access by the defence to the data from which incriminating evidence was inferred.

Member states must ensure that those who might be negatively impacted by AI systems have an effective and accessible remedy against the developers or deployers of AI systems who are responsible. Effective remedies should involve redress for any harm suffered, and may include measures under civil, administrative, or, where appropriate, criminal law. Moreover, because AI has a myriad of applications, remedies need to be tailored towards those different applications. This should include the obligation to terminate unlawful conduct, as well as the obligation to redress the damage caused, and compliance with the general rules about the sharing and reversal of the burden of proof in anti-discrimination legislation.