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Advancement or Impediment? AI and the Rule of Law

By Emily Binchy | June 2022

Introduction

Artificial Intelligence (AI) technology increasingly permeates our daily lives and has the potential to generate considerable economic benefits, however, it simultaneously has the potential to profoundly impact the rule of law and the values associated with a rule of law-orientated-society, such as the EU. The policy implications of an increased use of AI systems are therefore far-reaching.

This paper will begin by defining what is intended by the rule of law and by AI systems, and how the former must be upheld by the adoption of an ethical use of the latter; it will detail which elements of the rule of law are most endangered by the unregulated application of AI systems, namely the administration of justice, law enforcement and accountability; and it will analyse the options which may be taken in regulating AI in order to ensure that it is used in a way which complements, rather than hinders, the rule of law. The paper will conclude with some reflections on the implications of AI for foreign policy.

Section 1 – Definitions

Rule of Law

The rule of law is one of the cornerstones of the EU and is enshrined in Article 2 of the Treaty on European Union (TEU).¹ As a founding value, the enjoyment of other values and rights stem from adherence to rule of law principles. The European Commission identifies effective judicial protection – including *inter alia* independence, quality and efficiency – as the core element of the rule of law. Other important rule of law principles include accountability, transparency, legal certainty, respect for fundamental rights, and equality before the law. All of these principles may be adversely affected by the replacement of human oversight with AI systems. However, when deployed in accordance with the rule of law, AI systems can generate significant efficiency gains in public administration, security and the administration of justice.²

The rule of law is an important principle of governance with which to analyse developments in the use of AI in public administration. Examining the deployment of AI through the lens of rule of law principles, such as legal certainty, transparency and equality before the law, is necessary in order to ensure that this complex technology does not undermine fundamental rights. Given the impending transposition of AI into many aspects of life, a concerted, timely policy response is necessary in order to ensure that AI systems develop in a manner which does not impinge on rule of law principles.

It is noteworthy that rule of law generally is under considerable pressure at the time of writing in several EU Member States and the incorporation of AI systems, particularly in the administration of justice, has the potential to exacerbate this if left unchecked. This culminated on 27 April 2022 with the European Commission formally notifying the Hungarian Government that it had triggered the so-called conditionality mechanism, which links the EU budget to adherence to the rule of law, due to Hungary's systematic undermining of the rule of law.³ This followed a finding by the Court of Justice of the EU in February 2022 that the mechanism does not violate EU law, in response to a challenge

1 [EUR-Lex - 12012M002 - EN - EUR-Lex \(europa.eu\)](#)

2 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da> p. 12

3 [The European Commission's Latest Move Against Hungary Is Risky but Right | Strengthening Transatlantic Co-operation \(gmfus.org\)](#)

by Hungary and Poland. The Commission has accused Hungary of placing restrictions on media freedom and pluralism, and failing to investigate high-level corruption, among other charges. Rule of law is also endangered in Poland which has witnessed the undermining of judicial independence following the introduction of a disciplinary chamber which has the capacity to issue proceedings against judges who act in accordance with CJEU rulings.

Artificial Intelligence

The Alan Turing Institute defines AI systems as algorithmic models that perform ‘cognitive or perceptual functions in the world that were previously reserved for thinking, judging and reasoning human beings’.⁴ René Descartes’ famous phrase differentiating humans from other sentient beings, *je pense, donc je suis*, comes to mind in this context and could be viewed as encapsulating fears surrounding AI and its potential to rival human intelligence.

The [EU’s draft AI Act](#) – which will be further elaborated upon in Section 3 – defines ‘AI systems’ as software that is developed with machine learning, logic, and knowledge-based or statistical approaches that “can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations or decisions influencing the environments they interact with”.⁵ The Irish Council on Civil Liberties suggests amending this definition to exclude the reference to a ‘given set of human-defined objectives’, on the basis that this fails to incorporate both objectives defined by AI systems autonomously, and AI which is used for intermediate purposes as opposed to for ‘defined objectives’.⁶

Current AI derives its ‘intelligence’ from Machine Learning – rather than humans inputting rules into a machine, it learns by itself. Machines are trained using vast datasets, which are invariably embedded with human biases, sometimes in unforeseen ways.⁷ As technology often reflects societal values, algorithms can both perpetuate and exacerbate inequalities and discriminative practices.

The Intersection between Rule of Law Principles & Artificial Intelligence

As a framework, the rule of law may be considered nebulous in some respects, a criticism which has resulted a sliding scale of adherence to rule of law principles throughout the European Union. However, the EU remains committed to its founding values – including the rule of law – and these are a core component of the accession process. Specifically relevant to the rule of law for the purposes of this paper, candidate countries must demonstrate:

1. Respect for fundamental rights such as non-discrimination, and access to legal remedies should these rights be breached
2. Accountability of government officials under the law
3. Clear, and transparent laws in order to ensure legal certainty⁸

One of the main challenges to the rule of law from AI systems stems from the difficulties which often

4 [cahai_feasibility_study_primer_final.pdf \(turing.ac.uk\)](#)

5 [The EU’s new Regulation on Artificial Intelligence - Lexology](#)

6 [A serious loophole in Europe’s draft AI Regulation? - Irish Council for Civil Liberties \(iccl.ie\)](#)

7 [The big idea: Should we worry about artificial intelligence? | Books | The Guardian](#)

8 [EUR-Lex - accession_criteria_copenhagen - EN - EUR-Lex \(europa.eu\)](#)

arise in understanding how the system has arrived at any given conclusion. This affects the second and third criteria listed above, both which demand a certain level of transparency and clarity in decision-making. Similarly, AI systems can act as a deterrent in democratic participation, with some groups of citizens being de facto discriminated against or excluded from civic life due to their inability or lack of desire to engage with the necessary technology.⁹ This alienation from democratic participation affects their ability to exercise their fundamental rights.

Section 2 – Areas with Most Risk to Rule of Law Due to the Application of AI

As outlined in the introduction, this paper will focus on the main areas of practical application where the use of AI systems may present challenges to the maintenance of certain rule of law principles. These are the administration of justice, law enforcement and accountability.

From the outset of this section, it is noteworthy that the EU's proposed AI Act expressly prohibits AI systems which apply real-time, remote biometric identification in public spaces for the purpose of law enforcement, subject to certain, limited exceptions.¹⁰ The rationale behind this is due to the unacceptable risk posed to individuals by such technology, that irrespective of rule of law safeguards, is too egregious a breach of the right to privacy to be considered acceptable.

The 'Risk-Based' approach of the EU's draft AI Act, outlines various levels of risk:

- Unacceptable risk
- High risk
- Limited risk
- Minimal risk.

The EU's draft AI Act adopts a 'risk-based' approach, classifying AI systems into "unacceptable", "high", "limited", and "minimal" risk categories, in order to ensure that the regulation of AI technology does not impede its development in a way that would hamper European innovation or competitiveness. High-risk AI systems are referred to in Article 6.2 of the draft AI Act and must follow certain requirements, such as ensuring a degree of transparency and human oversight, in order to be compliant¹¹.

The Council of Europe describes AI systems as 'socio-technical systems', meaning that their impact is heavily context-dependent and not solely the product of the initial design.¹² The data input during development, along with the broader environment and the values of the human beings who deploy the system, all impinge on the eventual outcome. The Council of Europe's Ad Hoc Committee on Artificial Intelligence in a Feasibility Study from December 2020 highlights the potential of AI systems to enhance the rule of law and democracy, by making public authorities more efficient and thereby freeing up time to tackle longer term issues; AI systems can also aid in identifying public needs, as well as contributing to the development of policy on many levels.¹³

The study further points to the potential for AI systems to uncover corruption within public entities,¹⁴

9 [AI in the EU and Access to Justice – A Panel Discussion - Leiden Law Blog](#)

10 [EU artificial intelligence regulation - Philip Lee LLP](#)

11 [transcription_webinar_18112021_-_eike_graf.pdf \(europa.eu\)](#)

12 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>

13 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>

14 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>

enhancing the rule of law ‘anti-corruption’ criterion, which is included in the European Commission’s Annual Rule of Law Reports, given its prevalence in EU Member States.

The Use of AI for the Administration of Justice

An independent and impartial judiciary, guaranteeing a fair trial and access to justice for all is a crucial component of the rule of law. In particular, this means safeguarding the principle of equality of arms,¹⁵ meaning that each party to a legal dispute be afforded equal opportunity to present their case. The right to a fair trial is also reflected in Article 6 of the European Convention on Human Rights, which reads:

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*¹⁶

In line with the aim of promoting efficiency, the ‘digitalisation of justice’ has been high on the agenda of the European Commission in recent years, as part of a ‘new push for European democracy’ and aligning with the priority of building an EU ‘fit for the digital age’.¹⁷

The drive towards digitalising the justice sector treads a fine line between on the one hand facilitating access to justice for those who may not have had such access prior to the use of remote technology, and in distancing some members of society from access to judicial remedies if they lack the necessary technology to participate in a digital justice system. In the case of the former, where access to justice is enhanced, it is imperative that this be accompanied with the right to a fair trial in order to guarantee the rule of law.¹⁸ The use of AI systems in analysing evidence or making recommendations to the judiciary as to case outcomes, may hamper the right to a fair trial and falls under the ‘high-risk’ category delineated in the EU’s draft AI Act. Such systems include those intended to assist judicial decision-making through research and the interpretation of facts, and can also extend to the application of the law to a body of facts.¹⁹

The rule of law prerequisite that the judiciary be independent from political interference or otherwise, may be hampered by the use of AI systems in generating recommendations in favour of particular legal outcomes or courses of action. It is therefore important to ensure that members of the judiciary employing AI technology have a sufficient minimal level of understanding²⁰ of the process which will allow for human oversight and accountability for decisions made. The importance of implementing these oversight and transparency requirements is further underlined when viewed against the backdrop of a decline in the independence of the judiciary in EU Member States, such as Poland and Hungary.

As Machine Learning technology becomes increasingly mainstream, it may, in certain cases, be deemed a more efficient analyst of vast datasets than human beings.²¹ However, when such technol-

15 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>

16 [European Convention on Human Rights \(coe.int\)](https://www.coe.int/en/web/european-convention-on-human-rights)

17 [Digitalisation of justice | European Commission \(europa.eu\)](https://ec.europa.eu/justice/digitalisation/)

18 [DIGITALISATION-OF-JUSTICE-IN-THE-EUROPEAN-UNION.pdf](https://ec.europa.eu/justice/digitalisation-of-justice-in-the-european-union/)

19 [EU Artificial Intelligence Act - where are we now - GetInData](https://www.getindata.com/eu-artificial-intelligence-act-where-are-we-now/)

20 [cahai_feasibility_study_primer_final.pdf \(turing.ac.uk\)](https://www.turing.ac.uk/cahai-feasibility-study-primer-final.pdf)

21 [Artificial Intelligence in the administration of justice - Global Litigation News \(bakermckenzie.com\)](https://www.bakermckenzie.com/en/articles/2020/07/artificial-intelligence-in-the-administration-of-justice)

ogy is involved in the process of legal decision-making, previously thought to be reserved for highly skilled lawyers with years of expertise in applying the law accurately and with attention to nuance, the “thought-process” of these algorithms must be capable of being scrutinised. In making predictions of legal outcomes, serious concerns are raised pertaining to bias and transparency. These concerns are then amplified when analysed through a rule of law lens.

With regards to the use of AI systems in judicial decision making, an important distinction must be drawn between their use in civil, commercial and administrative matters, and in criminal matters.²² In the former, AI systems are likely to improve efficiency and even enhance the rule of law principle of legal certainty in improving the consistency of judicial outcomes.²³ However, in the latter greater caution is required in order to ensure that the rule of law guarantee of a right to a fair trial is upheld²⁴. The use of AI in the criminal justice system will be further elaborated upon in the following section.

The Use of AI for Law Enforcement Purposes – Policing and Criminal Justice

AI systems are increasingly deployed in order to profile both people and geographic areas and to determine the likelihood of a person re-offending or of crime being committed in a particular area.²⁵ Such use of AI systems is classified as ‘high-risk’ under the EU’s draft AI Act. The use of AI systems for this purpose could pose a direct threat to rule of law principles such as equality before the law, the presumption of innocence and non-discrimination. Its use has been objected to by myriad civil society organisations and on 1 March 2022, Fair Trials, European Digital Rights (EDRi) and 43 others issued a collective statement calling for the prohibition of predictive policing systems under Article 5 of the forthcoming AI Act.²⁶ Predictive policing in this regard entails the use of AI systems to identify individuals or groups who may be more likely to commit crime or areas in which crimes have a higher likelihood of occurring. This presents several legal and ethical dilemmas and poses a threat to the rule of law principle of equality before the law.

On 24 May 2022, the Council of the EU adopted a regulation amending the Europol Regulation.²⁷ This regulation aims to explore and develop new technological solutions to police cooperation, including solutions using AI. The regulation aims to simplify the processing of large data sets and to facilitate the sharing of data, both with private parties and third countries. The expansion of Europol’s capacity to use AI technology in this manner could have implications for law enforcement and the rule of law in the EU if appropriate safeguards are not put in place and enforced.

On 6 October 2021, the European Parliament adopted a resolution on the use of AI by the police and judicial authorities in criminal matters specifically.²⁸ The resolution states that the use of AI systems for law enforcement purposes must adhere to the GDPR-based principles of privacy by design and data protection by design.²⁹ Furthermore, in the context of predictive policing, MEPs cautioned against the use of ‘predictive policing’, as the causal link to decisions made by the AI systems in question cannot be established.³⁰

22 [ES250132_PREMS 005419 GBR 2013 charte ethique CEPEJ WEB A5.pdf \(bakermckenzie.com\)](#)

23 [ES250132_PREMS 005419 GBR 2013 charte ethique CEPEJ WEB A5.pdf \(bakermckenzie.com\)](#)

24 [ES250132_PREMS 005419 GBR 2013 charte ethique CEPEJ WEB A5.pdf \(bakermckenzie.com\)](#)

25 [AI Act: EU must ban predictive AI systems in policing and criminal justice - Fair Trials](#)

26 [AI Act: EU must ban predictive AI systems in policing and criminal justice - Fair Trials](#)

27 [Europol: Council adopts legislation entrusting new tasks to the agency - Consilium \(europa.eu\)](#)

28 [printsummary.pdf \(europa.eu\)](#)

29 [EP Resolution on AI in Criminal Law and Policing - eucrim](#)

30 [EP Resolution on AI in Criminal Law and Policing - eucrim](#)

Hungary is a leader in Europe in the use of facial recognition technology, and has developed a national database as part of its 'Dragonfly Project' to collect and store surveillance data from public spaces. The use of this infrastructure is concerning, given the disparity between the scale at play and the legal and ethical oversight, which lag significantly behind.³¹ Moreover, Hungary and Poland were the only two Member States to introduce a Home Quarantine App during the COVID-19 pandemic. This app used automated facial recognition technology in order to verify that people remained in quarantine for the necessary duration.

In Ireland, new powers are to be granted to An Garda Síochána permitting the use of facial-recognition technology by Minister for Justice, Helen McEntee. This technology will be deployed in identifying criminals from CCTV footage. Concerns have been voiced by the Irish Council of Civil Liberties regarding the potential of such technology to enable mass surveillance and discriminatory targeting surveillance.³² However, safeguards such as human rights impact assessments and the data protection implications are expected to be built into the legislation with the aim of attaining a balance between public safety, national security and the right to privacy and democratic participation.

These differing choices made regarding the use of AI technologies in law enforcement in EU Member States underline the need for a harmonised regulation across the Union. This is especially true in the context of upholding values as fundamental as the rule of law.

A further issue with the use of AI systems for law enforcement purposes is the lack of transparency and accountability which is intrinsic to this technology. The inability to determine how decisions or predictions were arrived at due to the so-called 'black box' reasoning of AI technology could be a violation of the rule of law principle of access to an effective judicial remedy. Moreover, the lack of accountability gives rise to a further contravention of the rule of law in that without the ability to attribute the infringement of fundamental rights to a human, such as the right to not be discriminated against, the corresponding right to an effective remedy is severely diminished.

As the AI Act continues to be the subject of debate in the European Parliament and Council of the EU, successive presidencies of the Council, namely those of France and Slovenia, have introduced loopholes to the text on the grounds of national security. Achieving a balance in the use of AI technology between national security and the rule of law will be a challenge to governments, regulators and enforcers alike.

Accountability

An important facet of the rule of law is equality before the law and as such, that no-one be deemed above the law. Those in positions of power such public and government officials, must therefore be accountable under the law. The decision-making process of AI systems, however, can give rise to difficulty in determining who should or could be held accountable for outcomes reached or recommendations made. A challenge in this respect is who should be held accountable when a decision is taken by an AI system using logic that is opaque or so-called 'black-box' reasoning.³³ Could responsibility lie with the person who inputs the data notwithstanding how unpredictable or far-removed the ultimate outcome is from the initial dataset? There are limited options in terms of resolving this issue,

31 [greensefa_report_a4_biometric_v3rev_web_1.pdf \(greens-efa.eu\)](#)

32 [Garda to use facial recognition technology – The Irish Times](#)

33 [Catching up with the Debate: Artificial Intelligence & the Rule of Law – RECONNECT \(reconnect-europe.eu\)](#)

as ultimately, the most salient option is that accountability rests with the designer and manufacturer of the AI system.³⁴ However, a possible implication of this approach could be a chilling effect on technological innovation, as developers refrain from designing AI systems due to the heavy burden of accountability.

The need to ensure accountability and transparency in the design, development and deployment of AI systems is routinely emphasised, however, there is less by way of practical guidance for implementing these in practice and ensuring their execution to the end point. Ensuring accountability is not simply a requirement under the rule of law, it is essential to upholding a relationship of mutual trust between figures of authority and citizens.³⁵ An erosion of trust in national governments may have more serious implications in Member States which already have low levels of trust in government, namely Poland, Croatia, Bulgaria and the Czech Republic, which ranked the lowest trust in government in a 2021 Eurofound survey.³⁶

Section 3 – Regulating AI Systems to Safeguard Rule of Law

Strong legal and ethical frameworks are needed in formulating a robust policy response to the design, development and use of AI that adheres to rule of law principles. Thoughtful policy responses which will accommodate the fast pace of development of AI systems are important in moulding AI systems into compliance with the rule of law in a manner that is future-proof. Enacting regulation which encompasses legal and ethical norms in accordance with the rule of law may guide users and developers of AI in ensuring that accountability, transparency and the protection of fundamental rights are prioritised from design to deployment.³⁷

Given the fast-paced development of AI technology, continuous monitoring is crucial in ensuring that the development and deployment of AI systems do not transgress the rule of law requirements. Ongoing impact assessments are therefore critical in ensuring that AI systems are used in ways which either positively or neutrally impact upon the rule of law.

A Legal Framework.

Steps towards the regulation of AI or the development of guidelines pertaining to AI are currently taking place in several fora, both nationally and multilaterally. The Council of Europe in Strasbourg, for example, is a standard setting body which has worked to avoid fragmentation of standards of AI by focusing on an ethical framework. The global AI landscape is deeply collaborative by necessity,³⁸ with both the potential benefits and disadvantages capable of permeating beyond borders. Fostering policy coordination internationally which bolsters beneficial and trustworthy AI and aligns with rule of law principles requires engagement by like-minded countries³⁹, and with countries such as China, whose use of AI differs considerably with that of western democracies. One of the main areas of divergence between China and the EU is China's use of social credit systems through facial recognition which is prohibited under the EU's draft AI Act. Surveillance such as this, without scru-

34 [The European Legislation on AI: a Brief Analysis of its Philosophical Approach - PMC \(nih.gov\)](#)

35 [AP4AI_Framework_Blueprint_22Feb2022.pdf](#)

36 [More trust in EU than national governments amid pandemic \(euobserver.com\)](#)

37 [catching-up-with-the-debate-artificial-intelligence-the-rule-of-law \(biicl.org\)](#)

38 [Strengthening international cooperation on artificial intelligence \(brookings.edu\)](#)

39 [Strengthening international cooperation on artificial intelligence \(brookings.edu\)](#)

tiny by parliament or in the public arena, diminishes individual rights and erodes trust in the rule of law.

Trust, transparency and privacy are the benchmarks which citizens will use to assess the adoption of AI in the EU. The EU aspires to adopt a leadership position in regulating AI,⁴⁰ emulating the standard-setting role it assumed with the adoption of the General Data Protection Regulation. The European Commission's 2020 White Paper on AI outlines that 'the EU will continue to cooperate with like-minded countries' who 'promote the respect of fundamental rights, including human dignity, pluralism, inclusion, non-discrimination'.⁴¹ Whilst it does not explicitly mention rule of law, the mention of fundamental rights and non-discrimination attach an importance to rule of law principles in the Commission's approach to AI.

On 21 April 2021, the European Commission presented its draft AI Act. The draft AI Act puts the citizen at the centre, prioritising the protection of fundamental rights and adopting a risk-based approach. One of the main requirements of the draft act is to conduct ex-ante conformity assessments to categorise the AI system based on its inherent risk.⁴² The scope of the draft act is purposefully broad and applies to anyone who uses AI in relation to EU residents.⁴³ The aim of this approach is to safeguard the fundamental rights of EU citizens through a codification of the EU's high ethical and legal standards.⁴⁴ In forging a path towards an ethical use of AI and implicitly adopting a rule of law approach, the Commission is shifting the paradigm of the so-called 'fourth industrial revolution'.⁴⁵

The role of the law in safeguarding rule of law principles from the negative potential of such a fast-paced technology, whilst also ensuring that the development of such technology is unfettered in order to develop in a beneficial way, is contentious. This is in part due to the profound geopolitical implications of AI systems and in part due to the pushback from the tech community which, in the main, believes that law should leave emerging technology to develop freely.⁴⁶ A contrast is drawn between a traditionally inflexible instrument such as the law, and the to a certain extent, unknown and unpredictable nature of what AI systems will look like in the near future. In response to this fear, the Commission has included a provision for "legal sandboxes" in the draft act in order to foster innovation unencumbered by demanding legal requirements.⁴⁷ This is a welcome provision given the steep costs of non-compliance of up to 6% of a firm's global turnover or €30 million.

An Ethical Framework

In terms of an ethical framework, the European Commission's High-Level Expert Group on AI, has produced 'Ethics Guidelines for Trustworthy Artificial Intelligence'. This duality of ensuring that AI technology is regulated in a way that is both legally enforceable and ethically sound, is challenging for policymakers but an important step in ensuring that rule of law principles and values are embedded in the regulatory response. The Commission's draft AI Act adopts a 'human-centric' approach to the development and regulation of AI. This is to ensure the protection of human dignity and fun-

40 [The EU-AI Regulation - Part 1: Overview and structure | Fieldfisher](#)

41 [Strengthening international cooperation on artificial intelligence \(brookings.edu\)](#)

42 [Machines learn that Brussels writes the rules: The EU's new AI regulation \(brookings.edu\)](#)

43 [The EU-AI Regulation - Part 1: Overview and structure | Fieldfisher](#)

44 [EU Artificial Intelligence Act: The European Approach to AI - Journal Article - Stanford Law School](#)

45 [EU Artificial Intelligence Act: The European Approach to AI - Journal Article - Stanford Law School](#)

46 [Machines learn that Brussels writes the rules: The EU's new AI regulation \(brookings.edu\)](#)

47 [EU Artificial Intelligence Act: The European Approach to AI - Journal Article - Stanford Law School](#)

damental rights, cornerstones of the EU values-based order. However, this term is open to criticism for being both anachronistic and ambiguous.⁴⁸

The Council of Europe's Ad Hoc Committee on Artificial Intelligence in its 2020 Feasibility Study, noted that the consequences of AI systems depend on the values and biases of the humans who develop them, underlining the necessity of ensuring accountability, as outlined in section 2.⁴⁹ The Committee warns that several principles essential to the maintenance of rule of law – such as ensuring transparency and accountability – are currently not afforded sufficient legal protection.⁵⁰ Such a lacuna in the regulation of AI is a matter of concern, given the potential implications its deployment can have for the maintenance of the rule of law. The Council of Europe has also established a European Commission for the Efficiency of Justice (CEPEJ), which has published a European Ethical Charter on the use of Artificial Intelligence in Judicial Systems and their Environment.

The OECD, in turn, adopted a Recommendation on Artificial Intelligence (AI) on 22 May 2019. The Recommendation aims to promote trustworthy AI while ensuring respect for human rights and democratic values.⁵¹ Principles from the Recommendation were subsequently drawn from by G20 leaders at the Osaka Summit in June 2019.⁵² The Recommendation contains five values-based principles for the 'responsible stewardship of trustworthy AI'. Three of these noticeably fall under the rubric of rule of law, namely: human centred values and fairness; transparency and explainability; and accountability.⁵³ The other two principles are inclusive growth, sustainable development and well-being; and robustness, security and safety.

Impact of AI on Foreign Policy

As AI is likely to impact on international relations in terms of issues such as the current lack of respect for the rule of law in certain EU Member States, the rise of authoritarianism globally, and a possible shift in the balance of power towards states with advanced AI capabilities, Foreign Ministries may have to review their policy positions to take account of the implications of this shift in a values-based approach to foreign and trade policy. As a tool with the capacity to influence power dynamics, the regulation of AI has become a focal point in international relations.⁵⁴

The potential for economic nationalism with divergent approaches to the deployment of AI varying considerably on national grounds, has resulted in calls for a reconfiguration of partnerships in some democratic countries to form a 'Strategic Tech Alliance'. While such an alliance could be politically challenging, the EU-US Trade and Technology Council, for example, if successful in its aim of harmonising technology standards, could act as a blueprint for a broader alliance. Launched in June 2021, the Trade and Technology Council (TTC) aims to strengthen technological leadership, among other goals, based on shared values.

The announcement in June 2021 of the establishment of an EU-US Trade and Technology Alliance⁵⁵ is founded on the basis of deepening cooperation on the development of new technologies based

48 [The European Legislation on AI: a Brief Analysis of its Philosophical Approach - PMC \(nih.gov\)](#)

49 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da> p. 5

50 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>

51 [OECD Legal Instruments](#)

52 [OECD Legal Instruments](#)

53 [OECD Legal Instruments](#)

54 [Europe Is in Danger of Using the Wrong Definition of AI | WIRED](#)

55 [EU-US Trade and Technology Alliance](#)

on shared democratic values, including respect for human rights. Cooperation on shared standards pertaining to AI and preventing its misuse will therefore be a core focus of the alliance.

The Global Partnership on Artificial Intelligence (GPAI)⁵⁶ is another initiative encompassing 25 stakeholders which aims to assess information relevant to understanding the likely impacts of AI in order to foster its responsible development.

In so doing, GPAI facilitates international collaboration on developing trustworthy AI. Members of GPAI share the values expressed in the OECD Recommendation on Artificial Intelligence and aim to develop AI rooted in respect for human rights, diversity, accountability and transparency.

GPAI Stakeholders:

Australia, Belgium, Brazil, Canada, Czech Republic, Denmark, France, Germany, India, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, New Zealand, Poland, the Republic of Korea, Singapore, Slovenia, Spain, Sweden, the United Kingdom, the United States and the European Union.

Implications:

As digital and physical realities increasingly overlap, authoritarian regimes, or those which do not respect rule of law principles, could permeate the digital and physical domains with greater ease.⁵⁷

The independence of the judiciary and the availability of judicial remedies lie at the centre of the rule of law framework of the EU. While the use of AI systems may facilitate legal certainty if decisions are more consistent due to them being reached by machines as opposed to human reasoning, it may also result in increased discrimination (depending on the dataset used), and an inability to explain the reasoning used. This ‘inexplainability’ of AI decision-making systems is incompatible with the rule of law and is of particular threat to the rule of law when applied in the criminal justice system.

AI systems carry implications which challenge the status quo more profoundly than previous ‘disruptive technology’. In an address to the IIEA in May 2021, MEP Dragos Tudorache, maintained that AI systems challenge the post-Westphalian order in which the state holds a monopoly on power and legislation, as governments begin to think about rendering public services available online to citizens and in doing so, morphing into ‘platform governments’.

A further implication for the post-Westphalian world order lies in the so-called ‘a-territoriality’ of the Commission’s draft AI Act, which applies to any AI system that has an impact on European citizens.⁵⁸ However, the implications of this are likely to be positive in terms of the scope and rate of compliance with the Act and the EU being positioned as a single interlocutor for all AI developers and vendors, rather than the need to deal with 27 distinct Member States.⁵⁹

The European Commission’s proposed AI Act may result in a fragmented legal landscape in the EU surrounding AI technology if too much discretion is vested in Member States regarding implementa-

56 [Global Partnership on Artificial Intelligence](#)

57 [Agile Alliances - Center for Security and Emerging Technology \(georgetown.edu\)](#)

58 [The European Legislation on AI: a Brief Analysis of its Philosophical Approach - PMC \(nih.gov\)](#)

59 [The European Legislation on AI: a Brief Analysis of its Philosophical Approach - PMC \(nih.gov\)](#)

tion. The AI landscape is, by nature, extremely collaborative⁶⁰ and oblivious of national boundaries. This means that legislative splintering is best avoided if the EU is to emerge as a leader in ethical AI. International cooperation with likeminded nations on AI is welcome and agreed democratic principles are an excellent starting point. However, translating such principles into thoughtful and lasting policy, will necessitate a deeper understanding of how the technology works in practice and the inherent trade-offs which may be required.⁶¹ In an age of great competition for attention, our capacity to think deeply about issues which lie at the foundation of democracy,⁶² adds a further challenge to our ability to formulate coherent and robust policy responses to this new and evolving technology.

Conclusion

Artificial Intelligence systems have the potential to increase efficiency, to identify corruption, to generate synergies and to pinpoint areas for cooperation and optimisation in society, amongst other benefits. Such systems, if designed, developed and deployed in line with the rule of law and its associated principles, namely, equality before the law, access to justice and accountability, could yield many benefits for society. This paper has focused on the use of AI systems in the administration of justice, both in the civil and criminal justice systems, the use of AI in law enforcement, including in policing and judicial decision-making, and the need for accountability and transparency to remain prevalent in all domains in which AI systems are applied. This paper aimed to analyse the debates taking place pertaining to the regulation of AI systems and the various ethical norms which are foisted upon the design of AI systems within the EU and 'like-minded nations'.

Given the aforementioned sliding scale of adherence to rule of law in the EU currently, regulating AI systems in order to embed a rule of law approach from its infancy, is of even greater importance and urgency if the rule of law is to remain relevant and safeguarded. Linking the EU's market of 450 million people to adherence to the rule of law, could both fortify and revive these founding EU values across the Member States.

60 [Strengthening international cooperation on artificial intelligence \(brookings.edu\)](https://www.brookings.edu/)

61 [Strengthening international cooperation on artificial intelligence \(brookings.edu\)](https://www.brookings.edu/)

62 [Algorithms, Artificial Intelligence and the Law \(bailii.org\)](https://www.bailii.org/)

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