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## ÍNDICE

**Paula Costa e Silva**

**Nuno Trigo dos Reis**

- 5 O financiamento por terceiro das despesas conexas com a acção popular de private enforcement.  
O Caso português.

**Pedro Moniz Lopes**

- 25 Implications of Genericity on the (In)consistency and (In)completeness of Legal Systems

**Paula Meira Lourenço**

- 55 Cyberjustice, artificial intelligence and the due process of law



# CYBERJUSTICE, ARTIFICIAL INTELLIGENCE AND THE DUE PROCESS OF LAW

Paula Meira Lourenço<sup>1</sup>

**Summary:** 1. Introduction – 2. The need for Cyberjustice – 3. Artificial Intelligence and ethical principles – 3.1. The principles of the “European Ethical Charter on the use of artificial intelligence in judicial systems and their environment” of the CEPEJ – 3.2. The ethical principles of the “Global Code of Digital Enforcement” of the UIHJ – 4. Important lessons learnt with the Covid-19 pandemic – 5. Conclusion<sup>2</sup>

## 1. Introduction

When using the term “Cyberjustice” I refer to the improvement of the performance and efficiency of the judicial systems and the alternative dispute resolution (ADR) by using information and communication technologies (ICTs). As it groups together all the situations in which the application of ICTs forms part of a dispute resolution process, whether in or out of court, “Cyberjustice” is used in preference to “e-justice” as implies that the use of information technology (IT) is a means of applying justice in the digital world<sup>3</sup>.

Artificial intelligence (AI) is considered as a term for a collection of concepts that allow computer systems

to work like the human brain, regarding its neural network, but using a mathematical system that can analyze a huge amount of data, pinpoint patterns and even predict decisions regarding the same issues. No wonder AI is one of the most important tools of Cyberjustice<sup>4</sup>.

This essay briefly aims to justify the need for Cyberjustice and AI regarding the judicial system, especially facing the challenges brought by the worldwide impact of the Covid-19 pandemic, as they can have the effect of lightening the load on judges, prosecutors, registrars, lawyers, enforcement agents, judicial officers and auxiliary staff, by freeing them from the drudgery of highly repetitive tasks (or tasks with little intellectual stimulus) and by reassigning them to tasks which cannot be performed by machines, which call for the kind of human intelligence and sensitivity that are the essence of justice. And it’s impossible to have justice without fairness, which can only be felt by humans (as far as we know until now).

Moreover, when facing the same instrumental circumstances, AI can increase material justice by indicating the judges the same material basis to create a fair decision, allowing the parties to trust that they’re treated with fairness (predictive justice as an instrument to a more consistent and unbiased application of the law, ensuring that unpredictable or unequal application of the law may become a thing of the past, when unconscious biases and external, irrelevant influences, are removed from the calculus of trial out-

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<sup>2</sup> This article partially draws on my previous texts: PAULA MEIRA LOURENÇO, “Cyberjustice”, in *23rd International Congress of the International Association of Enforcement Agents (UIHJ)*, Bangkok. 1st-4th may 2018, UIHJ Publishing, Paris, 2018, 427 - 435; and “Cyberjustice and the need of a responsible use of artificial intelligence, based on the respect of fundamental rights and ethical principles”, in *Cyberjustice, New Opportunities for the Judicial Officer - XXIV International Congress of the International Union of Judicial Officers (UIHJ)*, Dubai, 22<sup>nd</sup>-25<sup>th</sup> November 2021, Éditions Bruylant, Bruxelles, 2021, 199-204.

<sup>3</sup> PAULA MEIRA LOURENÇO, “Cyberjustice”, in *23rd International Congress of the International Association of Enforcement Agents (UIHJ)*, Bangkok. 1st-4th may 2018, UIHJ Publishing, Paris, 2018, 427. See Guidelines on how to drive changes towards cyberjustice (CEPEJ(2016)13 prepared by the CEPEJ-GT-QUAL from the preparatory work of Harold EPINEUSE (scientific expert, France).

<sup>4</sup> PAULA MEIRA LOURENÇO, “Cyberjustice and the need of a responsible use of artificial intelligence, based on the respect of fundamental rights and ethical principles”, in *Cyberjustice, New Opportunities for the Judicial Officer - XXIV International Congress of the International Union of Judicial Officers (UIHJ)*, Dubai, 22<sup>nd</sup>-25<sup>th</sup> November 2021, Éditions Bruylant, Bruxelles, 2021, 199-204.



comes). All these technological advances must be used for the benefit of justice, of a fair trial in due time – due process of law<sup>5</sup>.

## 2. The need for Cyberjustice

Cyberjustice<sup>6</sup> represents a significant advance in the field of the dispute resolution process and in recent years all Council of Europe member States<sup>7</sup> have deployed IT tools with a view to improving the performance and efficiency of their judicial systems. The introduction of digital tools was regarded in itself as a means of modernizing justice and IT was taking into consideration by the European Commission for the Efficiency of Justice (CEPEJ) as an item when evaluating the efficiency and quality of justice in the European

judicial systems<sup>8</sup> and as the main topic of thematic reports<sup>9</sup>.

Cyberjustice involves several tools, such as (i) access to justice<sup>10</sup>, (ii) communication between courts

<sup>5</sup> On the relevance of Cyberjustice in the Portuguese civil enforcement system, see PAULA MEIRA LOURENÇO, "A desjudicialização da execução cível em Portugal", co-authored with PAULA COSTA E SILVA, in *Execução Civil: novas tendências*, Studies in honor of Professor Arruda Alvim (Coordinators: Ministro Marco Aurélio Bellizze, Aluisio Gonçalves de Castro Mendes, Teresa Arruda Alvim, Trícia Navarro Xavier Cabral), Editora Foco Jurídico Ltda, 2022, 387-425. Regarding the guarantees of the due process of law, see also PAULA MEIRA LOURENÇO, "Processo civil executivo português à luz da Convenção", in *Comentário da Convenção Europeia dos Direitos Humanos e dos Protocolos Adicionais*, Volume II (Coordinator: Paulo Pinto Albuquerque), Volume II, Universidade Católica Editora, November, 2019, 994-1003.

<sup>6</sup> See PAULA MEIRA LOURENÇO, "Cyberjustice", in *23rd International Congress of the International Association of Enforcement Agents (UIHJ)*, Bangkok. 1st-4th may 2018, UIHJ Publishing, Paris, 2018, 427-435; *E-Justice, E-Agent d'exécution et la création de la Commission pour l'Efficacité des Exécutions: la réforme juridique de 2008 au Portugal*, 20<sup>e</sup> Congrès Union Internationale des Huissiers de Justice. Marseille. 7-12 septembre 2009, UIHJ Publishing, Paris, 2015, 261-270; *The Portuguese system of control over the profession of enforcement agent, in compliance with criteria defined by the European Commission for the Efficiency of Justice, in Efficiency of enforcement proceedings of court judgments and acts of other official authorities*, Publications of the International Scientific Conference, June 8-11 2011, Kazan, Federal University, 2011, 291-306; *Les nouveautés législatives du Décret-loi n.º 226/2008, du 20 Novembre: le renforcement du rôle de l'agent d'exécution portugais et la création de la Commission Pour l'Efficacité des Exécutions*, *Liber Amicorum*, Éditions Juridiques et Techniques, Paris, 2009, 285-293; *L'Exécution forcée des obligations pécuniaires au Portugal: situation actuelle et projet de réformes*, *Nouveaux droits dans un nouvel espace européen de justice - Le droit processuel et le droit de l'exécution*, Éditions Juridiques et Techniques, Paris, 2002, 267-274.

<sup>7</sup> Nowadays 47 member States.

<sup>8</sup> The CEPEJ's Working Group on the evaluation of judicial systems (CEPEJ-GT-EVAL) oversees the management of this process. In order to facilitate the process of collecting and processing judicial data, an online electronic version of the Scheme has been created and each national correspondent can access to a secured webpage to register and to submit the relevant replies to the Secretariat of the CEPEJ (so, the CEPEJ also uses an IT in its framework). The 2020 edition of the report uses the 2018 data.

<sup>9</sup> See the important Roadmap of the Working group on Cyberjustice for 2021 or "European judicial systems, efficiency and quality of justice: thematic report - use of information technology in courts in Europe", CEPEJ Studies No. 24, 2016 edition (2014 data).

<sup>10</sup> Samples of access-to-justice tools deployed in Europe: **Austria (COURT PUB)** – Online publication of decisions (commercial courts) and single-window commercial information service); **France (Justice.fr)** – Dynamic Information portal for litigants enabling them in particular to identify the court responsible and download the relevant referral forms; **Sagace** – Administrative service enabling the litigant to consult summary information on his/her legal case; **Consultation Avocats** – National platform for consulting a lawyer (by appointment, by telephone or email) whose services are then covered by a fees agreement; **JuriCA and JuriNET** – Case law database of the appeal courts in civil and commercial cases (JuriCA) and the Court of Cassation in all cases (JuriNET); **Medicys** – Online mediation platform for consumer disputes provided by the Chambre Nationale des Huissiers de Justice de France); **Netherlands (Rechtwijzer)** – Conciliation and mediation platform in advance of all proceedings concerning disputes involving human relations); **Portugal (Citius)**: online civil court platform to access to justice and to dispute settlement procedures; **SITAF**: online administrative court platform to access to justice and to dispute settlement procedures); **SISAAE**: working online platform of the Enforcement Agents, which communicates with the Citius platform so that all activity can be available at the court procedure, such as the online seizures of properties, cars, stock exchange shares, etc...); **Spain (Redabogacia)** – „One-stop-shop“ for filing an application for legal aid via a physical reception desk and online access). **Council of Europe countries – European Court of Human Rights (HUDOC)** – Access to all of the Court's case law via an advanced search engine); **Council of Europe countries – European Court of Human Rights (Webcasts of hearings)** – broadcasting of the Court's hearings on the Internet and provision of case data in several languages); **EU countries (e-Justice Portal)** – information portal on European legal systems (judicial systems and professions, European case law) with a single identification number for court decisions in Europe); **EU countries: Portal for the online resolution of consumer disputes** – platform to enable communication between parties to a cross-border consumer dispute in Europe); **United Kingdom (Make a**



and with professionals (tools to improve the flow and security of communications between professionals), (iii) tools for communication between courts and professionals, (iv) assistance for the judge, prosecutor and register, and (v) court administration.

From all these tools I would like to emphasize the access to justice, understood here in a broad sense, as it includes both ways of accessing the law (online information on one's rights, publication of case law) and access to dispute settlement procedures (online granting of legal aid, referral to a court or mediation service; use of videoconferencing; websites designed for the online settlement of disputes).

First, I would like to underline the importance of paperless communication with court users regarding their cases, consisting in services for referring a matter to a court directly online, mainly designed for proceedings not requiring compulsory representation. These services spare the citizen the trouble of sending documents in paper form (through the post or delivering them by hand to the court registry). Under this approach, the information systems enable citizens (whether or not assisted by a lawyer), to receive notifications concerning their cases in paperless form by means of SMS alerts or email, inviting them to visit a secure online account and/or contact their lawyer.

In some European countries there are paperless systems for delivering notices to attend hearings and for confirming the litigant's intention to attend by a message sent to his/her telephone a few days beforehand, thereby permitting a significant increase in court appearance rates for both sides in proceedings and, as a consequence, a lower proportion of hearings postponed. Other countries make the court's decision on the case available to the parties within their secure personal space, followed by information on the legal remedies available (whether online, or not) to challenge it or have it enforced.

Regarding the websites designed for the online settlement of disputes civil cases, they are generally used to deal with small claims (consumer disputes) or specific proceedings involving payment orders, but they are also developing in the area of family disputes (divorce proceedings).

The benefits are clear: (i) easier provision of information to litigants at all levels; (ii) reduction in waiting times at "physical" court reception desks or some journeys rendered unnecessary; (iii) online settlement of some disputes before bringing proceedings in order to relieve the courts of simple cases.

The IT tools are supported by Technology, such as (i) technologies used for direct assistance to judges,

prosecutors and court clerks (infrastructures, equipment and office software's; centralized databases for decision support; centralized legislative database; computerized national record centralizing all civil decisions; writing assistance tools; voice dictating tools; access to an intranet in the jurisdiction (broadcasting of national or local news); possibility of online training (e-learning) for judges, prosecutors and court clerks; (ii) technologies used for administration of the courts and case management (case management system; computerized registries managed by courts; statistics tools to measure courts activity; *business intelligence* tools based on the statistical tools been developed; use of the statistical activity data of courts to allocate them human and financial resources); budgetary and financial monitoring (budgetary and financial management systems of courts; measurement tools to assess the workload of judges, prosecutors and court clerks); (iii) technologies used for communication between courts, professionals and court users: use of information technologies to improve the quality of the service provided to the court users (technologies directly accessible to courts users without having recourse to a professional: general-interest information websites; the possibility to submit a case to courts by electronic means; the possibility to request for granting legal aid by electronic means; to monitor the stages of an online judicial proceeding); use of information technologies for improving the efficiency of the judicial system functioning (electronic communication between courts, lawyers and court users); a device for electronic signatures of documents between courts, users and/or professionals; videoconferencing between courts, professionals and users; recording of hearings or debates; admissibility of electronic evidences; (iv) other aspects related to information technologies: organization of the information system governance used by courts (*strategic governance* of the judicial system); device of detection and promotion of innovations regarding IT; security of courts information system; protection of personal data<sup>11</sup>.

<sup>11</sup> Regarding the importance of IT tools in the activity of the enforcement agents in Portugal see PAULA MEIRA LOURENÇO, *E-Justice, E-Agent d'exécution et la création de la Commission pour l'Efficacité des Exécutions: la réforme juridique de 2008 au Portugal*, 20<sup>e</sup> Congrès Union Internationale des Huissiers de Justice. Marseille. 7-12 septembre 2009, UIHJ Publishing, Paris, 2015, 261-270; *The Portuguese system of control over the profession of enforcement agent, in compliance with criteria defined by the European Commission for the Efficiency of Justice, in Efficiency of enforcement proceedings of court judgments and acts of other official authorities*, Publications of the International Scientific Conference, June 8-11 2011, Kazan, Federal University, 2011, 291-306; *Les nouveautés législatives du Décret-loi n.º 226/2008, du 20 Novembre: le*

**plea** – service for pleading guilty online to traffic offences, thus avoiding the need for the citizen to travel to the court when the offence is not disputed and enabling a court decision to be obtained within a shorter timeframe).



### 3. Artificial Intelligence and ethical principles

The use of the technology of AI is lightening the load on judicial professionals, by freeing them from repetitive tasks and reassigning them to tasks which call for the kind of human intelligence and sensitivity that are the core of a fair trial, and increases justice between similar cases, as it will indicate the judges the same proofs and materials in order to a fair decision, allowing the parties to trust that they are treated with fairness, as there is a more consistent and unbiased application of the law provided by predictive justice.

Predictive justice is a descriptive nomenclature for the application of AI using machine learning to complete tasks presently addressed by legal professionals. Machine learning involves the development of algorithms capable of sifting through enormous databases seeking data points relevant to general questions of jurisprudence, application of relevant law as well as legal research and analysis<sup>12</sup>.

I believe predictive justice allows the judicial branch to function with greater transparency, as it reduces legal uncertainty and the feeling of unfairness, ensuring that unpredictable or unequal application of the law become outdated, as unconscious biases and external, irrelevant influences, are removed from the calculus of trial outcomes<sup>13</sup>.

But how is that even possible? The long hours spent digging into jurisprudence are over: new technology offers dedicated legal search engines, and their algorithms allow researching and adapting to the user by learning from their research, by transforming jurisprudence into data. Some companies offer a statistical analysis that can be used by lawyers to assess the likelihood of success in a particular case, to determine the range of compensation awarded in similar cases in the past, or even to adapt their strategy by using arguments that are known to be convincing. For this reason, these tools aim to reduce legal uncertainty. This technology promises to put an end to justice that was

unpredictable and random to move towards something a bit more logical, scientific and a little more controllable.

But predictive justice can go beyond identifying the applicable statutory and common law basis for a claim. It can analyse the particular fact scenario presented by a client and will then value the claim and predict the likelihood of success in a suggested jurisdiction. In doing that, predictive justice will also assist legal counsel in identifying and framing a cause of action.

Additionally, a judiciary effectively using predictive justice will lead to a more efficient use of judicial assets, so courts can expect a reduction in overloaded dockets and a corresponding reduction in public and private costs of litigation, because well refined algorithms might reach the same conclusion or resolution that a judge or mediator might achieve, but sooner, saving time and money.

Predictive justice has taken on different forms around the world. In the United States and the United Kingdom, predictive justice has been used in the criminal justice for risk analysis of offender recidivism (e.g. to establish the terms and conditions of community based supervision for probation and parole). And it is also likely to see increasing use in the civil area. In France, there is no question now of implementing these kind of tools into criminal law, but start-ups are offering solutions to anticipate the chances of success of a case and the amounts of compensation in civil proceedings. And in Portugal AI is being introduced by some public administrative entities (that began using mathematical systems in order to analyze a huge amount of data, pinpoint patterns and underline trends in order to a more efficient supervision of certain economic sectors)<sup>14</sup> and was recently announced by Portuguese Minister of Justice as a relevant tool to introduced in the Portuguese administrative and tax courts<sup>15</sup>.

In all of these cases there should be concern over due process and procedural fairness. In order to prevent predictive justice from compromise the judge's independence and freedom, the AI tools regarding predictive justice must be designed to facilitate the judge's work, and not as a constraint (that can happen if he feels a pressure to do the same, or feel relieved of the responsibility of having to take a personal

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renforcement du rôle de l'agent d'exécution portugais et la création de la Commission Pour l'Efficacité des Exécutions, *Liber Amicorum*, Éditions Juridiques et Techniques, Paris, 2009, 285-293; *L'Exécution forcée des obligations pécuniaires au Portugal: situation actuelle et projet de réformes*, *Nouveaux droits dans un nouvel espace européen de justice - Le droit processuel et le droit de l'exécution*, Éditions Juridiques et Techniques, Paris, 2002, 267-274.

<sup>12</sup> Natural language processing (NLP) is a subfield of AI regarding the interactions between computers and human language, especially on how to get computers to process and analyze huge amounts of natural language data.

<sup>13</sup> See SUE COLLINS, *Predictive justice*, in *23rd International Congress of the International Association of Enforcement Agents (UIHJ)*, Bangkok. 1st-4th may 2018, UIHJ Publishing, Paris, 10-17.

<sup>14</sup> Autoridade Nacional de Comunicações - ANACOM (National Regulatory Authority for Communications of Portugal) is one of the public entities that is testing the use of AI on the proceedings regarding the treatment of consumer's claims (because of the huge amount of data), risk based supervision and sancionatory law.

<sup>15</sup> See RITA FILIPA GUERRA, "Inteligência Artificial ao serviço da Justiça", 01.09.2022, 1-5 (not published; by special permission of the author).



decision by following the majority of the other judges' decisions). In other words: the judge must remain in control of the procedure at all levels and the procedural fairness and adversarial debate must be respected.

Nevertheless, having machines and algorithms working for human beings have many risks. I would like to point two of them: machines are capable of generating misinformation at a massive scale (as they don't distinguish what's real online and what's fake) and computer information can be biased (e.g. against women or racist) as some neural networks learn from massive amounts of information on the internet, and that information was created by people<sup>16</sup>.

In order to prevent that to happen, AI and predictive justice must be subordinated to human sensibility, to the due process of law, *le droit à un procès équitable*, and of course, ally to its main economic advantages, which are saving resources and generating efficiency savings, increasing the important economic development of countries<sup>17</sup>.

If we want to have economic sustainable countries and a fair justice, based on AI and predictive justice, the systems must develop a responsible use of these tools, based on the respect of fundamental rights and ethical principles, which are essential in any State based on the Rule of Law.

### 3.1. The principles of the "European Ethical Charter on the use of artificial intelligence in judicial systems and their environment" of the CEPEJ

In 2018 the CEPEJ approved the "European Ethical Charter on the use of artificial intelligence in judicial systems and their environment", the first European instrument aimed at legal professionals, public actors (responsible for designing and deploying AI tools and services in this field, public decision-makers in charge of the legislative or regulatory framework and the development, audit or use of such tools and services), as well as at private companies.

This Charter sets out five substantial and methodological principles that apply to the automated processing of judicial decisions and data, based on AI techniques, which remind us that in judicial systems AI tools and services is intended to improve the efficiency and quality of justice. But that goal must be achieved res-

pecting the fundamental rights of individuals as set out in the European Convention on Human Rights (ECHR) and Council of Europe Convention N.º 108 on the Protection of Personal Data, as well as the other fundamental principles set out in the Charter<sup>18</sup>.

The five substantial and methodological principles of this European Ethical Charter are:

- (i) The principle of respect for human rights, which is fundamental as it aims to ensure, from the conception to the practical application;
- (ii) The principle of non-discrimination – due to the ability of certain processing operations to reveal existing discrimination by aggregating or classifying data relating to persons or groups of persons;
- (iii) The principle of quality and security is clearly stated - it should be possible to process data by automatic learning based on certified originals and the integrity of this data should be guaranteed at all stages of processing. The creation of multidisciplinary teams, composed of judges, social scientists and computer researchers, is strongly recommended, both at the drafting and steering stage and in the application of the proposed solutions;
- (iv) The principle of transparency, impartiality, and fairness - the methodologies and techniques used in the processing of judicial decisions is also of great importance. The emphasis here is on the accessibility and understanding of data processing techniques, as well as on the possibility for authorities or independent experts to carry out external audits;
- (v) The principle "under user control" - the need to make the user an enlightened agent and to feel in charge of their choices is stressed. In particular, the judge, the judicial officer, the enforcement agent should be able to return at any time to the decisions and data that have been used to produce a result and continue to have the possibility of departing from it, taking into account the specificities of the case in question. Each user should be informed, in clear and understandable language, of the binding or non-binding nature of the solutions proposed by AI instruments, the various possible options and his or her right to legal advice.

<sup>16</sup> SHIRA OVIDE, A.I. Is Not What You Think, in The New York Times, On Tech, 15.03.2021; CADE METZ, Who Is Making Sure the A.I. Machines Aren't Racist?, in The New York Times, On Tech, 15.03.2021.

<sup>17</sup> PAULA MEIRA LOURENÇO, Cyberjustice, in 23rd International Congress of the International Association of Enforcement Agents (UIHJ), Bangkok. 1st-4th may 2018, UIHJ Publishing, Paris, 2018, 435.

<sup>18</sup> Additionally the CEPEJ has formed the Working Group on Cyberjustice and Artificial Intelligence (CEPEJ-GT-CYBERJUST) entrusted with the task of "developing tools with a view to offering a framework and guarantees to member States and legal professionals wishing to create or use Information and Communication Technologies and/or artificial intelligence mechanisms in judicial systems in order to improve the efficiency and quality of justice".



### 3.2. The ethical principles of the "Global Code of Digital Enforcement" of the UIHJ

In 2021 the "Global Code of Digital Enforcement" of the *Union Internationale des Huissiers de Justice* (UIHJ) was approved and the first principle stated is the respect for the fundamental human rights of each national law<sup>19</sup>.

Regarding the ethical principles of digital use, this Code establishes that national law which provides for the use of digital in the enforcement of warrants should organise compliance with the ethical principles recognised by international conventions and charters: (i) respect for human dignity; (ii) non-discrimination, equity and solidarity; (iii) transparency and predictability; (iv) trust; (v) technological neutrality; (vi) quality and safety; (vii) respect for personal data and privacy; (viii) social responsibility of developers<sup>20</sup>.

I would like to underline the following five ethical principles, when using AI tools and services:

- (i) Respect for human dignity is essential in all electronic structures that are related to human beings; to consider the reasonable needs and expectations of individuals and leave them decision-making autonomy;
- (ii) Non-discrimination, fairness and solidarity, as a pillar of every State that respects the Rule of Law, ensures that none is discriminated on the basis of illegal or illegitimate criteria, and that all people have equal access to the benefits and advantages of AI;
- (iii) Trust is needed when dealing with algorithms; everyone should be able to correct them whenever necessary, and public entities should implement a certification process to ensure the ethical compliance of AI systems;
- (iv) Quality and safety of the data;
- (v) Respect for personal data and privacy, to protect all people from the risks of surveillance or intrusion into their privacy; intelligent systems must guarantee the confidentiality of data and the anonymisation of personal profiles.

### 4. Important lessons learnt with the Covid-19 pandemic

No one could predict that Cyberjustice would be in the centre of the worldwide impact of the Covid-19 pandemic regarding justice. In the countries where Cyberjustice tools were already functioning, it has

emphasized the importance of IT tools for the activity of the justice professionals, and the governments and parliaments had to approve emergency legislation to enable even more effective online communication between courts and stakeholders. In the systems depending on paper, the Covid-19 was the accelerator effect towards the digitization of their justice programs, mainly when the population was requested to stay at home and the expansion home working.

And while we are still suffering the impact of the Covid-19, I find it very useful to reflect on some aspects which I find particularly relevant, such as the main lessons learnt and challenges faced by the judiciary during and after the pandemic and the use of AI along with the ethical principles that should be taken into consideration.

In June 2020 the CEPEJ presented the seven main lessons ("*principles*") learnt and the challenges faced by the judiciary during and after the pandemic: (i) human rights and Rule of Law have to be protected at all times; (ii) access to justice must be maintained as much as possible, including providing access to justice by alternative means (such as online services or strengthening access to information through court websites, phone, email, etc.); (iii) safety of persons is essential (justice professionals, as well as of the users in courts); (iv) monitoring case flow, quality and performance (court presidents, judges and authorities responsible for court management should continue to monitor and manage cases according to their responsibilities, even remotely); (v) Cyberjustice (IT-tools offer the opportunity for the public service of justice to continue functioning during the pandemic); (vi) training is fundamental for the effective management of a health crisis, and training should adapt to the emerging needs, including the use of IT; (vii) forward looking justice (the COVID-19 was an occasion to introduce emergency innovative practices that should continue to evolve)<sup>21</sup>.

In my opinion the following four principles are the core of Cyberjustice as an IT-solution of the due process of law:

- (i) Human rights and Rule of Law always must be protected (the right to liberty and security and the right to a fair trial - articles 5 and 6 of the ECHR). Any reaction to a crisis (even a pandemic such as Covid-19) must be strictly based on the principles of the Rule of Law and must respect and protect human rights. Emergency measures must respect the principles of legality, legal certainty and proportionality and need to be constantly re-evaluated (principle 1);

<sup>19</sup> See article 1 (Respect for fundamental human rights) of the UIHJ's "Global Code of Digital Enforcement" (<https://www.uihj.com/downloads-2/global-code-of-enforcement/>).

<sup>20</sup> See article 2 (Respect for the ethical principles of digital use) of the UIHJ's "Global Code of Digital Enforcement".

<sup>21</sup> See the Declaration on lessons learnt and Challenges faced by the judiciary during and after the Covid-19 Pandemic adopted on 10 June 2020.



- (ii) Access to Justice is a fundamental principle of the Rule of Law. As locking down courts is a limitation of the access to justice, although necessary to protect the health and safety of justice professionals and court users, must always be done in a careful and proportionate manner. And it would always be preferable to ensure court functioning remotely (e-courts), by using digital tools (principle 2);
- (iii) Cyberjustice - IT-solutions, such as online services, remote hearings, and videoconferences, as well as future development of digital justice must always respect fundamental rights and principles of a fair trial (principle 5);
- (iv) Forward looking justice – the COVID-19 pandemic introduces emergency innovative practices. Some aspects of traditional court functioning should be reconsidered, such as the level of use of new technologies, and to increased recourse to ADR. The digital future of the judiciary should always respect the fundamental rights guaranteed in the ECHR, mainly the right to a fair trial. It would also be appropriate to maintain the necessary dialogue between all actors in the justice system and to take advantage of the new relations created between judges, prosecutors, court staff, lawyers, enforcement agents, notaries, mediators and experts at the time of the health crisis (principle 7).

Any kind of reaction to a crisis such as Covid-19 must be strictly based on the principles of the Rule of Law and respect and protect human rights. Any emergency measures introduced must have a fixed end date and judicial review must be possible in due time.

During the Covid-19 pandemic the Portuguese court civil procedure justice system and other ADR systems were able to deliver justice using Cyberjustice's tools and AI, bearing in mind the respect of fundamental rights and ethical principles, which are essential in a State based on the Rule of Law.

And recently the Portuguese Minister of Justice announced the introduction of AI tools in other areas of the justice system, and to grant justice in a reasonable time, within the respect of the due process of law guarantees, especially in the Portuguese administrative and tax courts<sup>22</sup>.

## 5. Conclusion

I believe it's time to start developing information systems capable of improving the quality of the service provided by justice (mainly the courts' justice). To achieve that here are some clues.

First, it's mandatory to set clear objectives linked to promoting the values of a fair dispute resolution process (either in or out of the court), and the proposed technical solutions should be harnessed for the purposes of the justice system and to the task of improving its quality, at every stage of the project. This means that Cyberjustice should be judicial-driven (not technology-driven), which implies that organizations must be able to set modernization objectives (free from any concerns related to the IT itself). This is an essential condition for the success of any project, without which there is a risk that it will fail to serve the interests either of those who use the dispute resolution processes (in or out of the courts) and of those who work in them.

Second of all, appropriate resources should be allocated commensurate with the projects' goals, involving future users in the development of the tools throughout the life of the project and develop a deployment policy involving all the stakeholders - going from a *project management* culture to a *hands-on approach to innovation*.

This means the adoption of a single, simple, clearly defined system of governance that makes it possible to separate the management of the project from the rest of the administration. Creating "temporary" structures in the form of a project team that incorporates both "business" and "IT" functions in a single unit is a practical way of ensuring better control over deadlines and, at the same time, an effective and speedy response.

On one hand, it is essential that the project team have some flexibility in the running of the project, so that they can have fast and easy recourse to *ad hoc* solutions and operations which could have knock-on effects on the project cost and schedule.

On the other hand, effective management by the same entity throughout the life of the system should allow on-going monitoring of the specific resources expended and make it easier to obtain feedback.

Finally, at every stage of an innovation project, independent experts and researchers from a wide range of disciplines can help to ensure successful change management, bringing fresh ideas and information about the strategy and development of information systems in a particular professional environment. This is particularly important when it comes to examining and learning about implementation problems, disappointments and/or failures in IT projects, making it

<sup>22</sup> See RITA FILIPA GUERRA, "Inteligência Artificial ao serviço da Justiça", 01.09.2022, 1-5 (not published; by special permission of the author).

possible to target future modernization policies more effectively, according to flexible, open co-operation arrangements.

The reflection about AI is an opportunity to lighten the load on justice professionals, by freeing them from highly repetitive tasks and reassigning them to intellectual challenges and more complex tasks which cannot be performed by machines, which call for the kind of human intelligence and sensitivity that are the essence of justice.

In order to have fair justice based on AI, the justice system must develop a responsible use of AI, based on the respect of fundamental rights and ethical principles, which are essential in any State based on the Rule of Law.

Cyberjustice and AI is not only about saving resources, generating efficiency savings, and increasing the important economic development of countries. It's also about ensuring a fair trial in a reasonable time, by allowing greater or easier access to justice, speeding the procedures, improving equality of arms, increasing the clarity of decisions and the transparency of the judicial system – the due process of law, the essential decision criteria of justice in any democratic State based on the Rule of Law.