Artificial intelligence and justice: human control is always necessary

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Artificial intelligence (AI) in the field of justice poses particular challenges in relation to fundamental rights. Judicial decisions must therefore never be fully automated and there must be clear transparency obligations for AI in the judicial sector.

What sounds obvious is not a matter of course in view of the practical developments in the judiciary in Europe and, especially, outside of it. In its statement no. 20/2020 on the EU Commission's White Paper on AI (cf. AnwBl 2020, 212), the German Bar Association thus analysed the problem in detail and presented possible solutions.

Firstly, it should not be forgotten that the use of AI also offers great opportunities for citizens seeking justice: lower costs and easier electronic access can improve access to justice.

On the other hand, however, AI poses major problems with regard to obtention of information, in decision-making processes and in the courtroom. Giving final decision-making powers to an AI system would violate the right to be heard by an independent court and to a fair trial as guaranteed by the Charter of Fundamental Rights and the Constitution. Therefore, in all cases, the power of opinion and decision must rest with a judge and not be based essentially on AI.

The use of predictive justice instruments can, unnoticed, influence the outcome of a decision in a discriminatory way. Ultimately, this even threatens to influence the development of the law. The judge must therefore always have sufficient discretion to make an autonomous, impartial and unbiased decision and this must be verifiable. Judges could therefore be obliged to make a statement on the extent to which they have made an AI-generated result the subject of their decision. In criminal proceedings, moreover, those affected often do not even know that they are subject to this technology and the underlying algorithm is usually not public.

The use of AI in the administration of justice, for example its use in Poland, shows that there are real risks regarding the independence of the judiciary. Whether the allocation of cases to a judge is truly random must be verifiable by disclosing the functioning of the underlying algorithm.

The EU Commission would be well advised to assess the impending fundamental rights risks in a differentiated manner and to create more than the "high" and "low" risk categories provided for in the White Paper as a threshold for future regulatory approaches. Justice is a high-risk area, whereby the probability of such a risk and the severity of a possible damage must also be taken into account. From a regulatory point of view, applications in the judiciary could be subject to a preventive authorisation procedure. Furthermore, the algorithm used must be explainable to the persons concerned or competent public authorities in retrospect. Only in this way can

the contestability of an AI-based decision always be guaranteed. In addition to appropriate legal remedies, this would also require an accompanying liability system.