

23 November 2021

Dear Members of CAHAI:

The Center for AI and Digital Policy (CAIDP) welcomes the opportunity to provide comments on the CAHAI draft of *"Possible elements of a legal framework on artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law."* We support the effort to strengthen human rights, democracy and the rule of law for the field of artificial intelligence through transparent and open consultation. We specifically support the recommendations set out in the CAHAI draft, including the strong emphasis on transparency, accountability, fairness, and redress, as well as further recommendations described below.

We also want to highlight the importance of creating a legally binding transversal instrument within the framework of the Council of Europe to enable AI-based systems to promote a better society where technology promotes broad social inclusion based on fundamental rights, democratic institutions, and the rule of law.

Over the last few years, many international organizations have adopted important frameworks for AI policy. The OECD adopted AI Principles in 2019. The G20 adopted AI Guidelines in 2019. This week UNESCO adopted the AI Ethics Recommendation. The EU and US have proposed a framework for AI policy in the context of the EU-US Trade and Technology Council. Although all of these policy instruments establish important AI policy norms, none are legally binding.

The Council of Europe is uniquely situated to establish a global standard for AI. The Council has previously developed successful treaties in the related fields of data protection and cybercrime. Within the program for Strengthening the Rule of Law, the CAHAI was instructed to complete a feasibility study on "a legal framework for the development, design and application of artificial intelligence."¹ The substantial draft of the CAHAI for the Council of Ministers, setting out the elements of a legal framework, reflects the high level of interest in a formal, legally binding instrument for AI.

Based on your invitation, our team of experts also proposes the following suggestions, which we believe should be considered for the CAHAI report for the attention of the Council of Ministers.

¹ COE Committee of Ministers, *Ad hoc Committee on Artificial Intelligence (CAHAI), Terms of Reference*, 1353rd meeting, 11 September 2019,
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809737a1

- **First, we encourage the addition of “sustainability” as a fourth criteria in the human rights, democracy and rule of law impact assessment.** The goal of sustainability has become an ever more prominent principle in the field of AI policy. The G20 digital ministers recognised the need to tackle digital technologies' significant consumption of energy and resources in their 2021 Declaration.² In the recently adopted UNESCO Recommendations on the Ethics of AI the value of “Environment and ecosystem flourishing” was included. The UNESCO Recommendation states that environmental impact should be reduced to “ensure the minimisation of climate change and environmental risk factors . . .”³ We urge you to consider adding this emerging value to the foreseen ones namely human rights, democracy and rule of law. The addition of sustainability is important because the other three norms are strongly reliant on sustainable development. If we do not develop these systems sustainably, then we will be left with far more divided societies and more unevenly distributed consequences which will strongly hamper the upholding of the other three values set out.
- **Second, CAIDP recommends a specific provision on the rights of the child.** It is encouraging that you mention the importance of protecting gender equality and the rights of vulnerable groups. Children as a group of special exposure in digital environments face the risk of harmful experiences, which is why the necessity of protection is of great importance. The G20 has recently recognized the importance of protecting the rights of children in the AI content. We share the view of responsibility of providers of digital services and products, including governments, companies, parents, guardians, civil society, educators, representative groups and children themselves, to provide and engage with technologies in a safe and responsible manner.⁴
- **Third, we propose a prohibition on AI-enabled weapon systems that implicate human rights.** We noted you do not address matters related to national defense in accordance with Article 1(d) of the Statute of the Council

² G20 (2021), Declaration of G20 Digital Ministers: Leveraging Digitalisation for a Resilient, Strong, Sustainable and Inclusive Recover, p. 2-3, https://www.g20.org/wp-content/uploads/2021/08/DECLARATION-OF-G20-DIGITAL-MINISTERS-2021_FINAL.pdf (visited 18 November 2021).

³ UNESCO (2021), Recommendation on the Ethics of AI, p. 8-9, <https://unesdoc.unesco.org/ark:/48223/pf0000377897> (visited 18 November 2021).

⁴ G20 (2021), Declaration of G20 Digital Ministers: Leveraging Digitalisation for a Resilient, Strong, Sustainable and Inclusive Recover, p. 6, https://www.g20.org/wp-content/uploads/2021/08/DECLARATION-OF-G20-DIGITAL-MINISTERS-2021_FINAL.pdf (visited 18 November 2021).

of Europe.⁵ As the protection of human rights remains within the Council's mandate, we recommend a prohibition of AI-enabled autonomous weapon systems that implicate human rights. Our recent review of country policies strongly indicates support among democratic nations for limits on these systems.⁶

- **Fourth, in relation to Human Dignity (pars. 14-17), we recommend a ban on biometric categorization of individuals and emotion analysis.** Manual forms of these practices have been used throughout history to justify hierarchies of humankind, practices of slavery, eugenics, and oppression of whole groups. None of these applications have any scientific basis or validity. Currently they use spurious correlations and questionable science to make inferences about personality, character, political and religious beliefs – again to deny a person their humanity, dignity, identity. We further propose a **Ban on scoring of individuals by public and private entities.** Human dignity relates to the recognition of the intrinsic and equal worth of each individual human being or a normative judgement of one group over another about what is good behavior. It requires no system segregate or objectify or categorize especially when the criteria are based on political concepts, physical traits, expressed opinions or spurious correlations. Biased risk or trustworthiness scores, coupled with biased datasets and huge power imbalances will result in cumulative disadvantages⁷ – deepening the structural imbalances we are trying to solve. Humans should be treated as moral subjects, and not as objects to be algorithmically scored or manipulated.⁸ We also propose **Expansion of protections and HUDARIA assessment.** People seeking refugee protections, asylum and those who are in prison should also be included in the recommendation.
- **Fifth, in relation to Rule of Law (pars. 45-47), we recommend a ban on prediction of future crime.** Human dignity also relates to aspirations and personal development of each individual without being defined by every single past behavior, network of affiliations, or biased datasets reflective of discriminatory practices. Every person deserves presumption of innocence,

⁵ CAHAI, *Possible elements of a legal framework on artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law*, N 6.

⁶ **Artificial Intelligence and Democratic Values** (CAIDP 2020) (findings), <https://www.caidp.org/aidv-2020/>

⁷ Gandy, O.H. (2009). *Coming to Terms with Chance: Engaging Rational Discrimination and Cumulative Disadvantage* (1st ed.). Routledge. <https://doi.org/10.4324/9781315572758>

⁸ The Alan Turing Institute (2021). *Human Rights, Democracy, and the Rule of Law Assurance Framework for AI Systems: A proposal prepared for the Council of Europe's Ad hoc Committee on Artificial Intelligence*. <https://rm.coe.int/huderaf-coe-final-1-2752-6741-5300-v-1/1680a3f688>

right to fair trial, due process, judicial independence, effective remedy and impartiality. This requires also a **Restriction on public authorities use of data collected by private entities**. Law enforcement and welfare management agencies increasingly purchase data from databroker vendors, or use private AI systems to access data that they could not legally collect or collect without authorization.

- **Sixth, in relation to Democratic Values**, we recommend a **Ban on biometric recognition (facial, voice and gait) systems used for mass surveillance purposes**. Indiscriminate mass surveillance whether implemented by public or private companies is intended precisely to manipulate or coerce social behavior and to control populations.

We also want to draw **direct connection with CAHAI's recommendations for elements of a legal framework and CAIDP's recommendations to national governments**.

The CAIDP is an independent, non-profit organization established to advise national governments and international organizations on AI and digital policy. In 2020 we published *Artificial Intelligence and Democratic Values*,⁹ a comprehensive report of the AI policies and practices in 30 countries. As set forth in this report, we recommend that countries:

- Establish national policies for AI that implement democratic values
- Ensure public participation in AI policymaking and create robust mechanisms for independent oversight of AI systems
- Guarantee fairness, accountability, and transparency in all AI systems
- Commit to these principles in the development, procurement, and implementation of AI systems for public services
- Halt the use of facial recognition for mass surveillance

We recognize that several of these recommendations are reflected in the draft CAHAI legal framework for AI, and express our support for this initiative on that basis.

We are available to discuss these points in further detail at the upcoming plenary session, November 30th to December 2nd.

Thank you for your attention to our recommendations.

⁹ *Artificial Intelligence and Democratic Values*, (CAIDP 2020), <https://www.caidp.org/aidv-2020/>.

Sincerely,



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