epic.org

Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009, USA

+1 202 483 1140
+1 202 483 1248
@EPICPrivacy
https://epic.org

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

COUNCIL OF EUROPE

Draft Recommendation of the Committee of Ministers to member States
on the human rights impacts of algorithmic systems

August 15, 2019

By notice published July 5, 2019, the Steering Committee on Media and Information Society (CDMSI) of the Council of Europe (COE) requested public comments on the Draft Recommendation of the Committee of Ministers to member States on the human rights impacts of algorithmic systems.[1] The Recommendation is expected to be adopted by the Committee of Ministers in early 2020. The protection of human rights in the development and use of AI is urgent. AI is already relied on today to make significant interventions in the lives of individuals - decisions about hiring, credit, and criminal sentencing. EPIC applauds the Recommendation of the COE to protect human rights in AI. EPIC submits these comments, first, to bring the Universal Guidelines for AI (UGAI) to the attention of Recommendation drafters. The Draft Recommendation includes

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[1] Council of Eur. News Invitation to comment by 19 August 2019, Coe.int (July 5, 2019), https://www.coe.int/en/web/freedom-expression/-/invitation-to-comment-by-19-august-2019; Comm. of experts on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT), *Draft Recommendation of the Committee of Ministers to member States on the human rights impacts of algorithmic systems*, MSI-AUT(2018)06rev1 (2019) https://rm.coe.int/draft-recommendation-of-the-committee-of-ministers-to-states-on-the-hu/168095eecf.

and expands upon nearly all UGAI principles, a declaration widely endorsed by civil society and experts. Second, EPIC recommends the COE incorporate outstanding UGAI principles prohibiting secret profiling and unitary scores and requiring terminations of AI systems which are beyond control.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age.[2] In 2014, EPIC launched a campaign for "Algorithmic Transparency" and has subsequently worked with national and international organizations to improve accountability for AI systems.[3] In 2018, after a petition from EPIC, leading scientific organizations, including AAAS, ACM and IEEE, and nearly100 experts called for public input on U.S. artificial intelligence policy, the National Science Foundation sought public comment.[4] EPIC has also submitted extensive comments to the National Institute of Science and Technology and the Office of Management and Budget urging prioritization of non-personal data in AI R&D and the protection of human rights in U.S. AI policy.[5]

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[2] EPIC, *About EPIC*, https://epic.org/epic/about.html.
[3] *See, e.g.*, Marc Rotenberg, The Future of Innovation and Digital Transformation: Exploring Societal Impacts, Remarks at the OECD Global Strategic Group Meeting, Epic.org (Nov. 19, 2018), https://epic.org/privacy/ai/Remarks-OECD-CSG-Rotenberg-2018.pdf; EPIC, *At UNESCO, EPIC's Rotenberg Argues for Algorithmic Transparency*, Epic.org, (Dec. 8, 2015), https://epic.org/2015/12/at-unesco-epics-rotenberg-argu.html; EPIC, Algorithmic Transparency (2018), https://www.epic.org/algorithmic-transparency/; EPIC, *Algorithms in the Criminal Justice System*, epic.org, https://www.epic.org/algorithmic-transparency/crim-justice/.
[4] EPIC, *Following EPIC Petition, National Science Foundation Seeks Public Comment on AI Policy,* Epic.org (Sept. 26, 2016), https://epic.org/2018/09/following-epic-petition-white-.html
[5] *See* EPIC, *EPIC Recommends NIST Implement OECD AI Principles, Back Universal Guidelines*, Epic.org (May 31, 2019), https://epic.org/2019/05/epic-recommends-nist-implement.html; EPIC, *Legal Scholars, Technology Experts Publish Statement on US AI R&D Policy*, Epic.org (Aug. 8, 2019), https://epic.org/2019/08/epic-legal-scholars-technology.html.

I. COE Should Consider the Universal Guidelines for Artificial Intelligence in Drafting the Recommendation

EPIC urges the COE to consider the Universal Guidelines for Artificial Intelligence (UGAI) in developing the Recommendation for human rights and AI. Proposed in October 2018 by the Public Voice Coalition, the UGAI framework is designed to safeguard individual rights when AI technology is used to make significant decisions about individuals. EPIC established the Public Voice project, today a broad-based coalition of civil society organizations, in 1996 to enable civil society participation in decisions concerning the future of the Internet.[6]

The UGAI seek to address decision-making AI, considering that AI impact on human rights is at its apex where used to make significant decisions about individuals' lives. The framework seeks to reduce bias in decision-making algorithms, ensure digital globalization is inclusive, create human-centered evidence-based policy, promote safety in AI, and rebuild trust in institutions.[7] Over 250 experts and 60 organizations, representing more than 40 countries, endorsed the Universal Guidelines for Artificial Intelligence ("UGAI").[8]

The UGAI comprise twelve principles intended to maximize the benefits of AI, to minimize the risk, and to ensure the protection of human rights. The UGAI was drafted both for the private sector to "buil[d] into the design of systems" and guide government action.[9] The Universal Guidelines for AI are:

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[6] *See* Public Voice, *About the Public Voice*, ThePublicVoice.org, http://thepublicvoice.org/about-us/.
[7] Public Voice, Universal Guidelines for Artificial Intelligence (2018), https://thepublicvoice.org/ai-universalguidelines/.
[8] Public Voice, *Universal Guidelines for Artificial Intelligence: Endorsement*, ThePublicVoice.org, https://thepublicvoice.org/AI-universal-guidelines/endorsement/.
[9] Public Voice, Universal Guidelines for Artificial Intelligence: Explanatory Memorandum and references (2018), https://thepublicvoice.org/ai-universalguidelines/.

1. **Right to Transparency.** All individuals have the right to know the basis of an AI decision that concerns them. This includes access to the factors, the logic, and techniques that produced the outcome.

2. **Right to Human Determination.** All individuals have the right to a final determination made by a person.

3. **Identification Obligation.** The institution responsible for an AI system must be made known to the public.

4. **Fairness Obligation.** Institutions must ensure that AI systems do not reflect unfair bias or make impermissible discriminatory decisions.

5. **Assessment and Accountability Obligation.** An AI system should be deployed only after an adequate evaluation of its purpose and objectives, its benefits, as well as its risks. Institutions must be responsible for decisions made by an AI system.

6. **Accuracy, Reliability, and Validity Obligations.** Institutions must ensure the accuracy, reliability, and validity of decisions.

7. **Data Quality Obligation.** Institutions must establish data provenance, and assure quality and relevance for the data input into algorithms.

8. **Public Safety Obligation.** Institutions must assess the public safety risks that arise from the deployment of AI systems that direct or control physical devices, and implement safety controls.

9. **Cybersecurity Obligation.** Institutions must secure AI systems against cybersecurity threats.

10. **Prohibition on Secret Profiling.** No institution shall establish or maintain a secret profiling system.

11. **Prohibition on Unitary Scoring.** No national government shall establish or maintain a general-purpose score on its citizens or residents.

12. **Termination Obligation.** An institution that has established an AI system has an affirmative obligation to terminate the system if human control of the system is no longer possible.

In essence, the twelve Guidelines call on institutions to confront the ethical, legal, and societal implications of decision-making AI.

The UGAI also respond to urgent public concerns. A recent survey by the PEW Research Center found that "majorities of Americans find it unacceptable to use algorithms to make decisions with real-world consequences for humans" - including in parole decisions, automated resume screening for jobs and automated video analysis for job interviews, and personal finance

scores derived from consumer data.[10] And PEW found "58% of Americans feel that computer programs will always reflect some level of human bias – although 40% think these programs can be designed in a way that is bias-free."[11] As a result, EPIC has written to Congress and submitted comments to U.S. federal agencies, urging the U.S. government incorporate the UGAI as a baseline for AI policymaking.[12]

II. EPIC Supports the Draft Recommendation and Recommends Incorporation of Remaining UGAI principles

EPIC strongly supports the COE's Recommendation on AI. The Recommendation not only incorporates nine out of twelve UGAI principles, but, as a more expansive guidance document, implements them with the requisite detail to direct government and private sector activity. EPIC would also urge the COE to consider incorporating the remaining three UGAI principles into the Recommendation.

EPIC applauds the Recommendation which incorporates and expands upon nine principles of the UGAI. For example, the UGAI #1 Right to Transparency is embedded in obligations of States to protect and promote rights A.4.1-4.3 of the Recommendation. These provisions together require states establish minimum transparency for processing criteria and methods, and that algorithmic systems in decision-making processing with high risks to rights be accompanied by strict standards of explainability of processes and outputs. Similarly, UGAI #4 Fairness Obligation

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[10] Aaron Smith, *Public Attitudes Toward Computer Algorithms*, Pew Research Ctr. (November 16, 2018), https://www.pewinternet.org/2018/11/16/public-attitudes-toward-computer-algorithms/.
[11] *Id.*
[12] *See, e.g.*, Letter from EPIC to House Comm. On Energy & Commerce (Mar. 5, 2019), https://epic.org/testimony/congress/EPIC-HEC-InclusionInTech-Mar2019.pdf; Comments of EPIC to Nat. Sci. Found. on "Request for Information on Update to the 2016 National Artificial Intelligence Research and Development Strategic Plan" (Oct. 26, 2018), https://epic.org/apa/comments/EPIC-Comments-NSF-AI-Strategic-Plan-2018.pdf.

is found in A.3.3-3.4, which require states ensure context sensitive testing and evaluation of algorithmic systems with regards to bias and discrimination and that testing on personal data be representative. UGAI #4 is also located in B.1.4 and B.3.1 requiring private sector products and services be without discrimination and mitigation of potential data biases. The Recommendation likewise contains robust articulations of UGAI #2-3 and #5-9: UGAI #2 (B.4.3); UGAI #3 (A.4.2), UGAI #5 (A.3.2-3.3, A.5.2, B.5.1-5.3), UGAI #6 (A.3.2, 3.5), UGAI #7 (A.3.1, 3.2, 3.4, B.3.1), UGAI #8 (A.3.1), and UGAI #9 (A.2.3, 3.1, 3.2, B.3.3).

However, EPIC recommends the COE incorporate UGAI Principles #10-12 not made explicit in the COE Recommendation. UGAI #10-12 prohibit secret profiling (#10) and unitary scoring (#11) and mandate termination of out of control systems (#12). The Principles build upon prior work by scientific societies, think tanks, NGOs, and international organizations, and incorporate elements of human rights doctrine, data protection law, and ethical guidelines.[13] The accompanying Explanatory Memorandum for the UGAI explain the intent of UGAI #10-12:

> The **Prohibition on Secret Profiling** follows from the earlier Identification Obligation. The aim is to avoid the information asymmetry that arises increasingly with AI systems and to ensure the possibility of independent accountability.
>
> The **Prohibition on Unitary Scoring** speaks directly to the risk of a single, multi-purpose number assigned by a government to an individual. In data protection law, universal identifiers that enable the profiling of individuals across are disfavored. These identifiers are often regulated and in some instances prohibited. The concern with universal scoring, described here as "unitary scoring," is even greater. A unitary score reflects not only a unitary profile but also a predetermined outcome across multiple domains of human

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[13] *Id.*

activity. There is some risk that unitary scores will also emerge in the private sector. Conceivably, such systems could be subject to market competition and government regulations. But there is not even the possibility of counterbalance with unitary scores assigned by government, and therefore they should be prohibited.

*The **Termination Obligation** is the ultimate statement of accountability for an AI system. The obligation presumes that systems must remain within human control. If that is no longer possible, the system should be terminated.*[14]

These principles confront real, emerging rights issues in AI. For example, the GDPR treats profiling, an evaluation of a person, as a unique concern among types of automated decision-making, requiring unique responsibilities for organizations.[15] The U.S. State Department annual review of human rights compliance featured the Chinese social credit system which "quantifies a person's loyalty to the government by monitoring citizens' online activity and relationships."[16] And development of lethal autonomous weapons, which risk spiraling out of human control, loom on the horizon.[17] These emerging issues in AI are the purview of recommendations from a powerful human rights organization like the COE.

III. Conclusion

EPIC welcomes the Recommendation of the COE on AI, which incorporate but expand upon many of the Public Voice UGAI principles. EPIC also urges the COE to consider

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[14] *Id.*

[15] General Data Protection Regulation [2016] OJ 2 119/33.

[16] U.S. Dep't of State, 2018 Country Reports on Human Rights Practices: China (includes Tibet, Hong Kong, and Macau) – China (2019), https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/china-includes-tibet-hong-kong-and-macau-china/.

[17] Autonomous Weapons: An Open Letter from AI & Robotics Researchers (July 28, 2015), https://futureoflife.org/open-letter-autonomous-weapons/?cn-reloaded=1.

supplementing the Recommendations with safeguards reflecting the UGAI #10-12 prohibition on

secret profiling and unitary scoring, and requirement terminations of AI systems beyond control.

Respectfully submitted,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President and Executive Director

/s/ Eleni Kyriakides
Eleni Kyriakides
EPIC International Counsel