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► To cite this version:

Raphaël Déchaux. Legal framework on AI: merits of different type of legal instruments according to the principles to protect or to promote. Hackathon du groupe de soutien du Comité ad hoc sur l'intelligence artificielle, Conseil de l'Europe, Jan 2020, Strasbourg, France. hal-03159688

HAL Id: hal-03159688

<https://amu.hal.science/hal-03159688>

Submitted on 1 May 2021

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Legal framework on AI: merits of different type of legal instruments according to the principles to protect or to promote

If the CAHAI concludes to the feasibility of a legal framework for the development of AI, three different options should be considered. I'll try to answer to the following two questions :

- What are the Instruments available within the Council of Europe legal framework?
- Why choosing one than another?

So, I'll briefly present to you these two points, and then I'll outline their expected effects.

I Presentation of possible instruments

1) a Recommendation

2) a Framework Convention

3) a “basic” Convention

A) Recommendation

There is already the PACE recommendation of 2017 on *Technological convergence, artificial intelligence and human rights*. There is also the first recommendation of the Committee of Ministers of 13 February 2019, which is broader than the CAHAI's mandate, on *the manipulative capabilities of algorithmic processes*.

The Committee of Ministers Recommendation is categorized in the field of soft law. Compared to hard law, it means that this category of standards are non-binding.

The benefit of this type of standards are well known, as are the negative aspects.

- For the benefit: a simpler and smoother process
 - A recommendation can be adopted easily and more promptly than a convention.
 - It can be the beginning of a new rule-making cycle: the universal declaration of human rights of 48 has conducted to the International Covenants of 66.
 - it can be modified easily
 - If the regulation proves to be bad, unenforceable, or even a counterproductive one
 - Or, in the event that the regulation is exceeded by the social evolution.
- Disadvantage
 - the Recommendation is a restraint but not a legal restraint
 - it may not be effective.
 - the lack of jurisdictional guarantee. There are no possibilities to enforce these principles with regard to citizens.

B) Framework Convention

When I was first told that a Framework Convention was considered, my first reaction was ok, but what is a Framework Convention and, more precisely, what are the differences with a “basic” convention? In the French academic literature, there are very few developments on this point.

It is a convention supposed to set out principles that should serve as a basic foundation for cooperation between States Parties in a given area, while leaving to the latter the responsibility to define, through separate agreements, the appropriate modalities for this purpose.

It does not create specific obligations for the States, but establishes a process of continuous negotiation. The latter imposes on the governments the obligation to participate in good faith in the subsequent stages of the negotiations. Most often, this type of conventions serves as an umbrella for future protocols. Accordingly, a Framework Convention is not an end-point in its own sake but involves a subsequent activity which may take several forms

- treaty activity, by means of an another “basic” convention, for example, the UN Framework conventions on climate change of 1992 led to the adoption of the Paris Agreement of 2015.
- institutional activity, by means of an expert committee. There are three types of functions for those committees:
 - assisting the Council of Ministers
 - proposing recommendations to the Council of Ministers
 - examining State reports and checking their conformity with the Convention. Then, the Council may subsequently make recommendations to the States.
- or soft law by means of a recommendation

However, within the Council of Europe law, framework conventions are not the unique tool allowing the subsequent adoption of other standards or the implementation of committees. For example, the ECHR has numerous protocols. “Basic” conventions, such as the CSE or the CPT have established powerful committees. Therefore, the possibility of adopting subsequent protocols and/or implementing committees should not be a decision-making factor.

Most framework conventions deal with international environmental law (UN Framework conventions on climate change of 1992), we can also mention the WHO Framework Convention on Tobacco Control of 2003.

But the Council of Europe has an older experience in this area, namely with the following three conventions:

- The 1980 European Outline Convention on Transfrontier Co-operation (translated in french: Convention-cadre européenne sur la coopération transfrontalière) which has been developed with 3 protocols (1995, 1998 and the last was from 2009).

- We have also the Framework Convention for the Protection of National Minorities of 1995.
- Framework Convention on the Value of Cultural Heritage for Society of 2005.
- A few words about the 1995's framework convention:
 - this agreement fulfils an ambitious demand on minority protection, specially for the Roma people.
 - This experience, in my opinion, is very enlightening for the IA issue. The choice of a framework convention instead of a "basic" convention was motivated by the challenge of reaching a consensus in this particular area.
 - So far, this initiative was not a huge success for the Council of Europe.
 - First of all, it does not define the concept of "national minority". It would probably be unacceptable for CAHAI not to provide a definition of AI.
 - By contrast, the Outline Convention of 1980 and the last mentioned of 2005 define their subjects very clearly.
 - The Convention for the Protection of National Minorities sets out a number of "programme provisions" establishing objectives that States commit themselves to achieve. Its implementation is mainly ensured by national measures and only subsidiarily by bilateral agreements.
 - It did not lead to the production of subsequent standards, only to the establishment of a Committee of Experts in charge of examining the application of the Convention by the States Parties. A look at the latest report does not allow us to be very optimistic about the effectiveness of this convention.
 - However, this lack of effectiveness is certainly not due to the fact that the Convention is a framework convention, but to the fact that the subject matter is extremely sensitive.

C) Basic Convention

Three categories of conventions can be distinguished depending on their purpose

- Harmonization Convention (ECHR or Convention 108 on data protection)

- Cooperation Convention (European Convention on Extradition)
- Convention “à la carte” : European Social Charter or the European Charter of Local Self-Government: Governments can choose a minimum from a core set of rights.
- The adoption of a convention is not a guarantee of effectiveness. It depends on
 - what follows
 - another convention, protocol or nothing ?
 - how the convention is incorporated into domestic law. Basically, there are two conditions:
 - the first one concerns the convention itself: is it self-executing?
 - the second concerns the States: has it been recognized a direct effect in domestic law?
 - If the answers are yes to these two questions, the convention’s efficiency will be greater
 - Does the convention imply obligation of means or obligation of results ?
 - ECHR is the most influent convention of the Council of Europe. It has set international standards that are followed throughout the world, on the African and American continents.
 - It contains obligations of results and the European Court ensures its enforcement.
 - Agreement of Paris of 2015 or the COP 21 is a "true" international convention but, in my opinion, with a soft law content. Obligations are expressed in a conditional form and it contains exclusively obligations of means.

II Presentation of expected effects

Each of these three types of instruments could be considered for the AI regulation, but the effects will not be the same. In fact, the choice will essentially depend on the objectives assumed by the States through this regulation.

- If the aim of the States is a simple clarification of the principles that should make possible the regulation of AI, a simple Recommendation is conceivable
- If the purpose is a supervision by a CoE committee and the establishment of a certification procedure: a Framework Convention could be adequate
- If the States consider that the risks involved in AI technology require binding Law: a Convention is required

A) Recommendation

A recommendation would provide standards that could inspire

- national legislators when drafting future legislation.
- They can also be a useful source of inspiration for the courts:
 - The ECHR has already quoted a recommendation of the CM in the *Prisma Presse vs. France* case of June 2002.
- Recommendations may sometimes inspire other conventions

3 arguments can be presented against a recommendation

- No individual guarantee that these standards will be enforced
- What's the point? Is the ambition of the Council of Europe to produce the one hundred and seventh ethical charter on AI?
- Generally speaking, there is a huge movement in favour of the soft law. This phenomenon is explained by the conviction that soft law is self-regulation supposed to allow a more flexible society and, in the end, a more efficient regulation. In my view, the history of the soft law tells the opposite. The self-regulation effectiveness has never been proven, neither legally nor politically. In fact, the self-regulation effectiveness is a commercial argument. It is up to us not to buy it.
- Soft law can be a very useful instrument for international regulation but only if it is supplemented by hard law. We know that the *International Development Law* could not survive only on the soft law basis.

B) Framework Convention

A framework convention could provide European harmonisation, particularly through the establishment of a consultative Committee or an expert committee in charge of periodic evaluation or through the introduction of a certification process for some AIs.

2 arguments reveal the risk of the lack of effectiveness of a framework convention. Indeed, the effectiveness of a committee depends on the social influence of its subject and the target audience of its standards:

- is the regulation intended for the States?
 - This may be adequate, for example, the Committee for the Prevention of Torture: a part of the population is concerned by human rights conditions for the inmates.
 - This is probably not as relevant for the "Advisory Committee on the Framework Convention for the Protection of National Minorities". The latest annual report states that the reception by the governments, the public and the media is very reticent to its efforts
- is the regulation intended for the private sector?
 - A national report would be useless since it often concerns multinational or Non-European companies.
 - As the publication of the Council of Europe committees reports are often confidential, an NGO practice to force the moralization of the private sector is "name and shame".
 - This would probably be just as useless considering that the people have become used to moral and ethical misconduct by some tech companies over the years. Has the Cambridge Analytica scandal led Facebook's users to desert it or just put less political information on their accounts? Not only the number of subscribers has continued growing, but, these users continue to freely express their political preferences.

C) “Basic” convention

A basic convention would allow the most efficient regulation of AI. It would allow all potential developments already provided for by the instruments studied previously, while at the same time being highly binding for States wishing to ratify this text.

The arguments put forward against this type of instrument are related to the risks of such classical international regulation. I will refer only to two of these arguments :

- First of all, a soft law regulation, like a recommendation, would allow a smoother transition economically. This argument is based on a comparison with international environmental law.
 - It is a flexible law because the economic issues are very important, and the ecological transition has a huge cost that is indisputable. However, for AI, the regulation of these activities present no real risk: the establishment of a supervisory or control authority is affordable.
- Secondly, a soft law regulation would prevent Europe from being left behind in the research and development of European AI. A binding convention would limit such research and business, although the USA and China are already well ahead of the Council of Europe member states in this field.
 - This cost argument can be balanced with the Council of Europe values if AI is developed without limits.
 - The development of certain AI technologies will lead to the wealth of their creators, and to the States wealth, as well, allowing their development. That's for sure. But some of these technologies seem to be in direct contradiction with our values, especially facial recognition or predictive criminal justice.

- The question – a little bit naive – we have to ask ourselves is what will Europe lose if we slow down the development of this type of particularly freedom-killing technology? Money? Maybe, it is better to preserve what constitutes our European identity, namely the protection of human rights, the rule of law and democracy, rather than engage in an economic competition over products that will allow some states to continue to violate these values?

A basic convention will allow us fighting against the risks inherent to the use of AI, not theoretical but concrete risks. Do we want the standardization of software like Compass or HART? 2 elements suggest imposing the adoption of this type of instrument:

- The need to criminalize specific behaviours. For example, the use of AIs that could lead to discrimination.
- The need to establish digital fundamental rights. This would allow people to oppose these guarantees both to the government and to the private sector.

In conclusion, I would like to suggest that the regulation of AI should be seen in the same way as the regulation of other beneficial but potentially dangerous products. For example, pharmaceuticals or nuclear products. Today, no one can deny that the international community needs the regulation of these products, just as no one can deny that their development has not led to an improvement of the human condition.