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Reflecting on case-law databases and publicity of judgments in the light of the ECHR

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ABSTRACT

The research aims to examine the impact of private and public case-law databases and algorithms on which the related consultation software are based on the publicity of judgments in the framework of the European Convention of Human Rights.

PAROLE CHIAVE

Case-law database; publicity of judgments; public trial; fair trial; AI; algorithms.

Public and private case-law databases are an increasingly indispensable tool also to judges: the AI huge computational capabilities have made it possible to carry out complex research in even shorter timeframe with a growing accuracy rate.
However, these instruments hide many pitfalls which can affect the courts in the exercise of their judicial functions. For instance, there is the danger that under the weight of such a huge amount of data the judge abandons himself to a sort of "decisional conformism". Even if this evokes the value of consistency of case-law, as held by the European Court of Human Rights, the case-law development is essential since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement[1].
The issue of the right to access to the databases and to the algorithms on which the related consultation software are based has only recently been addressed and solely under the point of view of the rights of defence, without considering the position of citizens.
The greater attention on the aspect concerning the rights of defence derives from the fact that the accused person and the prosecutor in criminal proceedings or the parties in civil trials are the most interested in knowing and understanding all the elements that have contributed to the grounds for decision, in view of the effective and efficient exercise of the right of appeal.
Nevertheless, this does not justify an attitude of complete disregard to the second question. Article 6 § 1 of the European Convention on Human Rights ("Right to a fair trial") statues that «[j]udgment shall be pronounced publicly».
This is therefore a fundamental principle, which protects citizens from a "secret justice" that escapes the control of the collectivity. Moreover, it contributes to preserving confidence in courts[2].
However, it is clear that in order to achieve these results, it's necessary that not only the decision taken must be made public, but also that citizens should be able to comprehend the judge's reasoning. In other words, to ensure the effectiveness of the guarantee, it is not sufficient only the publicity of the final result: what is also indispensable is get to know the factors that influenced such a result.
This implies that also individuals inevitably have a legitimate interest in accessing the same databases used by the court as well as in knowing how the related consultation software work.
From a normative point of view, the above mentioned Article 6 § 1 of the European Convention on Human Rights provides for exceptions at the publicity of the "trial" exclusively based on the necessity to safeguard morals, public order, national security, interests of juvenile or the private life of the parties.
Nonetheless, the free access to databases and to algorithms on which the related consultation software are based has to deal in practice with the economic interest of the service provider, particularly when it is a private body.

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[1] See ECtHR, *Lupeni Greek Catholic Parish and Others v. Romania*, 29 November 2016, application no. 76943/11, § 116: http://hudoc.echr.coe.int/eng?i=001-169469.
[2] See ECtHR, *Serre v. France,* 29 September 1999, application no. 29718/96, § 21: http://hudoc.echr.coe.int/eng?i=001-62936; ECtHR, *Gautrin and Others v. France*, 20 May 1998, application no. 38/1997/822/1025-1028, § 42: http://hudoc.echr.coe.int/eng?i=001-62726.

The provision of entire algorithms or the underlying software code to the public – as has been said by the Council of Europe's Committee of Experts on Internet Intermediaries (MSI-NET) study on "Algorithms and Human Rights" – «is an unlikely solution in this context, as private companies regard their algorithm as key proprietary software that is protected»[3].
This does not mean, however, that is not possible to identify a compromise solution. Notably, the "European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment" drafted by the European Commission for the Efficiency of Justice (CEPEJ) in 2018 states that, in order to ensure the principle of transparency, the system «could be explained in clear and familiar language (to describe how results are produced) by communicating, for example, the nature of the services offered, the tools that have been developed, performance and the risks of error»[4].
As it is not possible to completely exclude any control the Charter also affirms that «Independent authorities or experts could be tasked with certifying and auditing processing methods or providing advice beforehand. Public authorities could grant certification, to be regularly reviewed»[5].
The aforesaid remarks on the existence of an economic interest in limiting access to the case-law databases cannot apply to the public service provider.
From this perspective, the solution adopted by the Council of Europe with regard to the decisions of the European Court of Human Rights is to be welcomed. And in fact, the HUDOC database which is the official case-law database of the Strasbourg Court has always been open source.
The implementation of the "ItalgiureWeb", which is a database developed by the "Centro Elettronico di Documentazione" of the Italian Supreme Court of Cassation that has been always available to the judiciary, instead, has been very different. In fact, it was only last February that the Italian Minister of Justice concluded an agreement which allows not the individuals, but solely lawyers to access such a database freely and at no cost[6].
In conclusion the hope**,** in the light of the above mantioneted considerations, is that, with regard to the private databases, the solution proposed by the CEPEJ will be accepted and, with respect to the public ones, the model developed in the context of the Council of Europe will become the starting point, but not the milestone.
To ensure the effectiveness of the publicity principle is in fact necessary that even the terms used for the single research as well as the algorithms behind the data bases' consultation software are publicly available.
Only in this way can the individuals and *a fortiori* the defence reach a sufficient degree of understanding of the decision.
Even if it can appear far from the current reality, it would be essential in any case that the judge's reasoning shows the ways through which the research in the database has been conducted.

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