Universiteit Utrecht

GRADUATE SCHOOL OF LAW, ECONOMICS AND GOVERNANCE

Algorithmic criminal procedure

Rick Robroek

Algorithmic criminal procedure

1. Hansken
2. Legal framework in the here and now
3. Legal framework in the future

Practice of algorithmic criminal procedure

Hansken

Hansken

A digital platform using standard (explainable) algorithms and a little bit of AI

So Hansken doesn't do a whole lot. It doesn't:

- Generate correlations
- Generate scenario's
- Have a perception of relevance
- Take the context or the suspect into account
- Decide

Algorithmic criminal procedure

1. Hansken

2. **Legal framework in the here and now**

   - What types of evidence are we talking about?
   - The Marengo judgement
   - The Supreme Court's view

3. Legal framework in the future

What types of evidence are we talking about?

Written document: art. 339 par 2 sub 5 CCP

Judge decides about the reliability, defence can force the judge to address this (art. 359 par 2, second sentence CCP)

The Marengo judgement

According to the court, the

‘substantial part of the arguments the defence raised relate to the assertion that there was no fair trial as referred to in Article 6 ECHR, in particular because the right to equality of arms as an interpretation of Article 6 (3) (b) ECHR was violated’

The Marengo judgement

'The defence claims that it has not had sufficient opportunity to review and challenge the evidence obtained with Hansken because it has not been given access to Hansken's source data and software. The development and use of Hansken are not regulated and there is no possibility of counter-expertise. Moreover, Hansken should not have been used because it is an unlawful technical aid, as it does not meet the requirements for it in the Decree on Technical Instruments for Criminal Procedure. Finally, the data are incomplete and forensically unreliable.'

The Marengo judgement

The Court considers it important that the defence in the meantime always had the possibility

‘to approach the examining magistrate with a substantiated request, for instance with specification of relevant search terms, to search within the source data (or have it searched) for specific messages of which the defence is of the opinion that the Marengo dataset should be expanded with it’

but that the defence did not make use of that possibility.

The Marengo judgement

The court stated that ‘only’ ten per cent of the (then approximately 610,000) messages in the Marengo dataset consisted of communications from PGP lines attributable to suspects, and that the remaining ninety per cent of the messages were communications from third parties or from suspects via PGP lines not (yet) identified at that time.’

The Marengo judgement

The court ‘recognises the danger outlined by the defence that when bulk data is analysed by complex algorithmic systems, the results of the system become leading without being able to check the underlying algorithms’. In the context of the right to a fair trial (and thus equal trial opportunities), the defence should, in the court's view, be able to check whether the results produced by Hansken are reliable. According to the court, this ability to check is not without limitations, either.

The Marengo judgement

‘Stating in general terms that “the control possibilities are insufficient” cannot be considered as such’

‘In case of doubt about the completeness of a message, additional checks can always be carried out in Hansken itself or with analysis facilities outside Hansken’.

On this basis, the court concludes that the possibility of control and counter-expertise therefore did exist, ‘albeit that the defence would then have to let it be known what, in what way and by whom should be examined’. The defence did not do so.

The Marengo judgement

The court considers that Hansken is not used ‘to obtain evidence’ but that ‘Hansken is used for the purpose of viewing evidence, after it has been obtained’.

The encrypted messages are therefore regarded by the court as other writings within the meaning of section 344(1) under 5 CCP. This also means that these messages can only be used in evidence in conjunction with other evidence.

The Supreme Court's view

Supreme Court 28 June 2022, ECLI:NL:HR:2022:900.
Supreme Court 23 May 2023, ECLI:NL:HR:2023:743-746.

The court saw no reason to doubt the reliability of Hansken and the authenticity of the untouched data. According to the court, further investigation was not necessary.

The Supreme Court’s view

AG Harteveld

Appropriate ‘to make a distinction between the reliability of the search engine Hansken and the reliability, or authenticity, of the data generated using Hansken’.

Harteveld endorsed the court of appeal's opinion ‘that the search engine Hansken does not affect the reliability of the – underlying – Ennetcom data’ and that ‘the authenticity of the messages found in the Ennetcom data attributed to the defendant’ did not need to be doubted

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1. Hansken

2. Legal framework in the here and now

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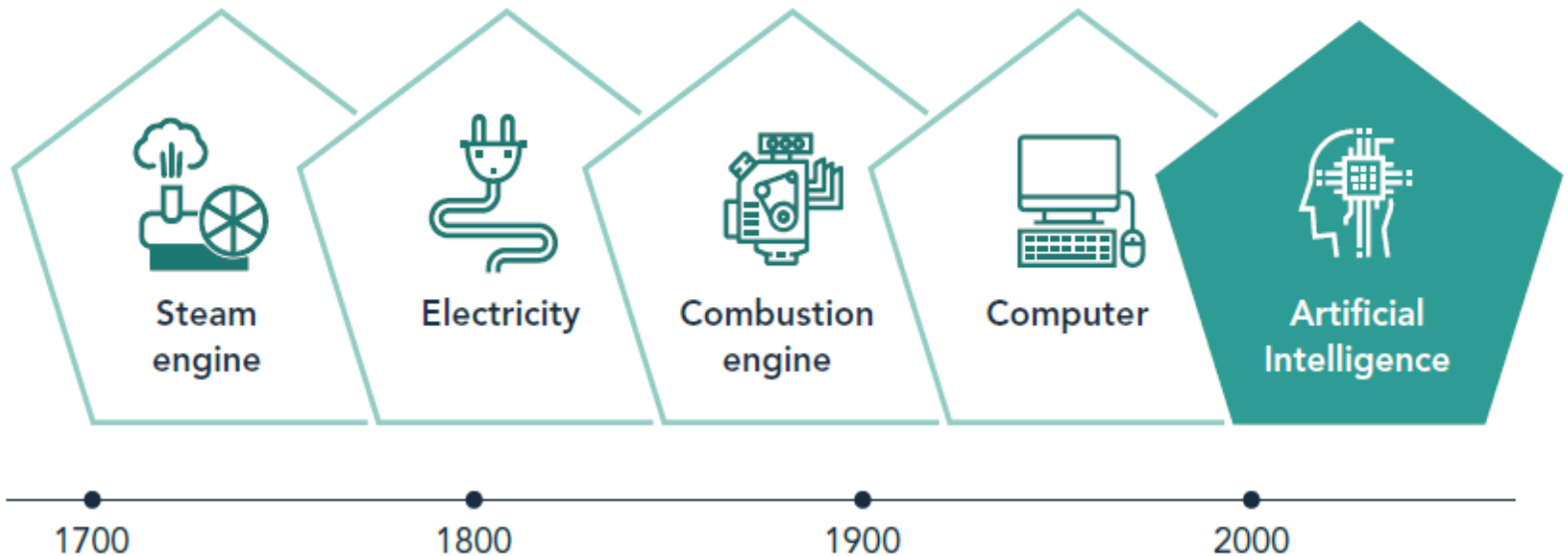
3. **Legal framework in the future**

AI is a new system technology

AI is not just another technology. AI is best compared to the steam engine, electricity, the combustion engine and the computer. These are system technologies. They are technologies that can be used throughout the economy and society for a variety of purposes. As a result, such technologies have a great impact that is, moreover, highly unpredictable. For AI we can learn from dealings with these earlier technologies



Collingridge dilemma

First, you don't know (how to act)
→ information deficit

Then, you cannot act (on your new knowledge)
→ power deficit

Legal framework in the future

Regulation via the Dutch PPS

Review by courts

Not instead of but ahead of legislation.

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Sharing science,
shaping tomorrow