

Clarifying Human Rights Under the Prism of the EU Initiatives on Artificial Intelligence

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Abstract

The present work aims to shed light on the work of the EU in artificial intelligence and in particular in the adaptation and use of the latter in the field of human rights protection. The first attempts are connected with the General Data Protection Regulation (GDPR) which put the basis for discussing some innovations that led to the proposal of Regulation of Artificial Intelligence of 2021 as a supporter to cover gaps of the past, and to create an important network for the protection of personal data and support the evolution of the digital market.

Keywords: GDPR, regulation IA, protection of human rights, EU law, comparative law

1. Introduction

The continuous development of new technologies especially from the United States and China make Europe feel like the “distant relative” who has lost the way of novelties. Speaking of artificial intelligence (AI) we mean sophisticated systems, capable of understanding the evolution of users within certain limits and with the outcome often ambiguous and unsafe, perhaps because there is also a lack of legal regulation.

By the expression artificial intelligence, we mean: “(...) of machines endowed with a very significant calculation capacity. Artificial intelligence systems are, in fact, computers (and computer programs) that combine large amounts of data (so-called Big Data), with the aim of learning how to manage future decision-making processes (...). We are not dealing with machines capable of making real

decisions, but more simply of drawing certain conclusions from the data that can be deduced from previous experiences (...)” (Gillespie, 2014). The continuous work of the AI is very extensive and transcends not only the economic sphere but also the public order control (Castets-Renard, 2022), for the management of public transport networks, pollution control, public health and telemedicine. It concerns a series of sectors where human development and collective well-being remain the first argument for carrying out this work.

It was the European Parliament that tried to regulate the AI through a preparatory report organized by the rapporteur Mady Delvaux trying to identify the legal, deontological principles and at the same time responding through a proposal for a regulation on AI. The related work was approved through the Resolution of 16 February 2017. As was obvious, this is not a finished work, but “suggestions” to

autonomously develop and fill in some rules, especially juridical ones, in the absence, however, of the ethical ones that are necessary for this area of legal regulation. The report of the European Parliament: “(...) clearly states that the matter requires specific regulation and that the existing legal framework is not sufficient to regulate the industry that exploits the mechanisms of artificial intelligence (...). It points out that the machine, as such, cannot assume legal personality (...). The consequence is that the obligations that will derive from the legislative instruments that will be introduced at the European level will apply to the creators of the system or to the planners; but never to the machine itself, which is incapable of being the recipient of subjective juridical situations (...).”

The related regulation on AI was also discussed at the Tallinn European Council of 29 September 2017 where: “(...) the Member States renewed their commitment to rapidly complete the so-called digital single market (...).” It has not brought important results but only a Declaration on cooperation in the field of AI signed on 10 April 2018: “(...) the signatory countries, in addition to renewing their commitment to increase investments to allow the creation of a European Digital Union, established that the subsequent regulation of artificial intelligence should have been the result of a “balancing” with other fundamental rights, such as, in particular, the protection of privacy (...).”

This was followed by a Communication from the European Commission, on 25 April 2018, where: “(...) given the huge investments required, the executive body recognized the need to also involve private individuals in the collection of data and in the development of technical suitable tools (...).” In reality, the executive body failed to make a conclusive decision, limiting itself to conferring the mandate on a specific group of experts. The work continues with the subsequent communication, of December 2018, in a more precise and “rigorous” way. A real coordinated plan for the development of artificial intelligence was approved which should have taken into account the pre-existing legal framework and the one set up to protect personal data (Cowert, 2017).

A group of experts elaborated the related ethical principles that pass from the development of the AI in a more complete form in the March of 2019 entitled: Guidelines. The relative regulation of

the human-centered AI was underlined showing thus the anthropocentric character of the European attempt and implying the relative AI programs that allow human intervention to take the relative necessary decisions. In particular, the Guidelines stated that: “(...) (the) AI systems must guarantee the confidentiality and protection of data during the entire life cycle of the system (...)”. Furthermore, the Group of Experts identified the Commission which ran to ensure a form of control by the human being. The control by the human being in the relative functioning of the AI systems was reaffirmed, which can be disregarded thus from the protection of fundamental rights and the protection of personal data.

The work of the Council of Europe has also come within this working circle where the Advisory Committee (so-called T-PD) based on the Convention for the protection of individuals with regard to automatic processing of personal data (Convention 108), has stated that: At all stages of processing, including data collection, AI developers, manufacturers and service providers should adopt a human rights by design approach (Lane, 2022) avoiding thus any potential bias even involuntary or hidden. AI developers should carefully screen the quality, nature, origin and quantity of personal data used, reducing unnecessary, redundant or marginal data during the development and training phases and then monitor the accuracy of the model as which is fed with new data (Tzimas, 2020; Tinnirello, 2022).

Thus, the EU has taken a step forward by reiterating that the developers of the related AI systems must design the systems taking into consideration the right of the interested party, i.e., of the human being in a precise, exclusive way to an automated decision, as well as to avoid discrimination regarding the related algorithms that will be placed in the established system. The EU continues with the publication of the White Paper on artificial intelligence in February 2020 stating that the development of such systems must be transparent allowing the interested party to decide, in full autonomy, and not be subjected only to an automated decision (Sanz-Urquijo, Fosch-Villaronga & Lopez-Belloso, 2022).

Already the EC has involved members of the European civil society as well as companies operating in the sector to collect opinions on the subject by subsequently presenting through the

European Council a legislative proposal to safeguard our values as well as our fundamental rights and our security in a socially balanced way. Therefore, the functioning of artificial intelligence systems would not have been an end in itself, but would have contributed to guaranteeing the affirmation of the European model at the level of global rules (Micklitz, Tom Thumbs, Reichman, Simoncini, Sartor & De Gregorio, 2022). The European Parliament, with a subsequent resolution, asked the Commission: "(...) that the proposal under preparation take into account the existing legislation on data protection (...)".

As can be understood, the EU through its institutions has tried to regulate the AI through exhaustive regulation that takes into consideration the human factor, i.e. the protection of fundamental rights and as a consequence the protection of personal data, a sector that for years has been pursuing with caution and continuous effort.

The proposal for a regulation on the AI discipline was presented by the European Commission on 21 April 2021. It tried to respond to the liability of the producer for defective products while maintaining the relative attention on the protection of fundamental rights (Pagallo, 2013; Pagallo, 2017). Thus, a certain strict liability has been introduced to an AI system which shows that the relevant Regulation has spoken of damage from a design or manufacturing defect of the system. The first typology of the related proposal includes high-risk systems where the behaviours determine a classification of users, in order to attribute them a certain social score or to evaluate their economic reliability putting in force a generalized prohibition of introduction on the market, which can be waived only for purposes of public order, such as the prevention of crimes or terrorist attacks. The second typology from articles 6-51 have to do with the greatest number of provisions. Systems that cumulatively include two characteristics with the aim of being used as a safe object product by harmonization provisions at a supranational level enter this category that is called high risk. The product is subject to a relative evaluation which must comply with the standards of third parties and which respects the relative products thus establishing the relative secondary, supplementary obligations which help the "suppliers" of AI systems establishing a

registration system. Continuous monitoring of the functioning of the system as an obligation of transparency and information for the end users who have to do with the overall functioning of the system is necessary. In practice, suppliers must ensure that high-risk artificial intelligence systems comply with the requirements of the regulation before placing them on the market and must in any case ensure that human oversight of the artificial intelligence decision-making processes is always possible to ensure compliance with all these parameters, following a certification procedure, with specific bodies specifically authorized by the Member State authority, along the lines of the one already envisaged for the marking of products with the EC mark. The certificates thus issued must be drawn up in one of the official languages of the Union and are valid for five years. The third category of products, which we could define as "moderate risk", includes all those artificial intelligence systems intended to operate with people, which are not included in the previous two categories. With respect to these products, the proposed regulation is limited to establishing, for suppliers, only a specific obligation to inform users. In particular, the suppliers guarantee that "(...) natural persons are informed of the fact that they are interacting with an AI system (art. 52) (...)".

As was obvious, the proposed regulation envisaged the establishment of an Artificial Intelligence Committee to carry out the related liaison and consultancy functions. The Committee has the task of facilitating the dissemination of techniques for the construction of artificial intelligence systems, as well as that of facilitating the concrete implementation of the provisions of the regulation and establishing a specific competent authority, with the task of supervising and reporting any adverse events that may affect the functioning of artificial intelligence systems. The supervisory authority, which will generally be the same in charge of personal data protection, has the power to impose sanctions, which in some cases can reach up to six percent of the worldwide turnover of the company operating in the sector (Tinnirello, 2022).

The application of the Regulation 2016/679 on the protection of personal data has also included the AI which requires a large mass of data which these systems can have at their disposal. Fundamental moment for the functioning of an

artificial intelligence system, should be therefore, the data collection phase. The artificial intelligence regulation does not deal with the collection and processing of data, which therefore remain subject to the instruments in force and, in particular, to the regulation 2016/679, on the protection of personal data. It remains to be clarified at this point which discipline is applicable to them, once they are entered into the system. It is the same EC that accompanied the proposal of the Regulation of the IA clarifying that: “(...) does not affect the general regulation on data protection (Regulation (EU) 2016/679) (...)” (Buttarelli, 2016; Voigt & Von Dem Bussche, 2017; Erdos, 2021).

The Regulation on personal data attempted to protect the fundamental rights that were already established by art. 8 CFREU and of art. 166 TFEU (Blanke & Mangiamelli, 2021). Thus, it is understood that these normative sources are aimed at implementing a fundamental right expressly provided for at the level of the primary source. Additionally, it is easy to say that both derived sources under consideration should be applied cumulatively. There are various textual elements of the proposed regulation on artificial intelligence that seem, in fact, to confirm this conclusion.

Recital 24 describes: “(...) the methods of collecting biometric data (i.e. data concerning the physical, physiological or behavioral characteristics of an individual, through which it is possible to unequivocally identify a specific subject) (...) any processing of biometric data and other personal data affected by the use of AI systems for biometric identification purposes (...) should continue to meet all the requirements deriving from art. 9, par. 1, of Regulation (EU) 2016/679 (...)” (Enarsson, Enqvist & Naarttijärvi, 2022). Equally important is the recital 72 which provides for: “(...) the creation of spaces for experimenting with artificial intelligence systems — i.e. of those spaces in which the artificial intelligence systems are developed and trained — take into account the provisions of art. 6, par. 4, of Regulation 2016/679, in the hypothesis in which the data collection cannot take place behind or the consent of the data subject (...)”. Overall, there is a clear indication of legislative commitment that allows us to speak to regulatory instruments that are applied cumulatively.

2. The Data Controller

Both the Regulations of personal data and on AI have identified the data controller. The latter should be unique and responsible for the collection and processing of data as well as the recipient of user requests for the exercise of rectification and limitation of data transfer (Frantziou, 2014; Kropf, 2014; Vlachopoulos, 2018; Liakopoulos, 2020).

As far as the AI systems are concerned, there are surveys that have to do with different tools, i.e. acoustic sensors, cameras, facial recognition technologies but also with other connected objects that will be able to perceive and process the related data. The access elements are capable of collecting the related data which are necessarily diversified and multiple and respect the idea of the existence of a unitary figure considered as the owner of the legal situations which are passive and active in the use of certain personal data. The data controller is also the owner of the AI system.

The AI systems are composed by scientists capable of making decisions independently of human control. Within this circle we recall that art. 4, par. 1, no. 7 of the Regulation of personal data defines the data controller and expressly refers that it is the natural or legal person, public authority, service or other body which, individually or together with others, determines the purposes and means of processing, clearly including in the category of the owners also entities without a legal entity (“the service or other body”). However, it seems to require a minimum of personification to take on the role of data controller, excluding the possibility of identifying him with the artificial intelligence system. Art. 22 of the Regulation of personal data provides that the interested party can request not to be subjected exclusively to an automated decision (Tinnirello, 2022).

The passive subject must not be influenced by a given treatment and requests not to be subjected to a relative automated decision as a consequence that the AI system must be conceived in such a way as to allow human intervention, i.e. the intervention of a subject with full legal capacity and equipped to exclude the machine and related decisions. The provisions on data protection also provide for the power of the national authorities to impose sanctions by linking a different graduation of the pecuniary penalty as well as the voluntary

nature of the behavior of the offender. Whoever decides in the AI sector is also responsible for the calculation of data, as the result of discretionary choices, indicative of a legal landscape that conceives an artificial intelligence system with an automated way any human intervention that remains open to the descending obligations of the application of the Regulation of personal data relating to the functioning of an AI system. The obligations proposed by the Regulation are imposed on the supplier of the AI system as its trainer. The regulation of personal data and in particular art. 22 provides for the right to rectification by requesting de-indexing or the relative cancellation of personal data, links to web pages that concern him, limitation of treatment and data portability to a different treatment system. The AI system includes also the Regulation 2016/679, i.e. the descending obligations as a regulatory source weighing on the company exercising a right of possession, as well as the use of the AI system which is due to a precise guarantee of the exercise of the guaranteed rights of the Regulation on personal data, the operational phase of the system and the identification of the data controller who at this point is responsible according to national law.

3. Principles of Minimization, Data Collection, Consent and Anonymization

Another discourse related to AI is that of data collection which actually responds to articles 5 and 6 of the Regulation on personal data (Tinnirello, 2022). The collection of data has to do with the principle of minimization as the express consent of the interested party which imposes only the data necessary for a specific purpose and which are canceled once the treatment ends. The principle of consent represents the internal heart that revolves around the prerogatives of the interested party for the protection of data concerning him. This is a not so precise process in the AI system given that the use of collected data for various processing purposes are presented as predictive models for the use of urban areas and which also use other data, for example such as number of crimes verified with large areas of operation of a crime prevention system thus suggesting to the local police to employ the available patrols. At the time of data collection, the operation of the AI system is connected with the relative consent of the users who pay attention when they give their consent (Zarsky, 2017). Visiting

the related navigation sites invites us to name those who accept everything via a button, leaving although the choice of those who refuse to actually manage their preferences. It simply accepts the use of personal data as future uses of the facts and personal data. A greater use is required from the point of view of time that the average user is willing to bear basing on the Regulation on personal data as a form of minimization of consent, a reality that dates back to the distant Directive 95/46. They are conceived in a huge diffusion to the internet and the development of the data industry as a concrete functioning of AI systems which constitutes the main work of multinationals in relation to privacy abuses and the collection in the market of the related data exchange.

This processing observation of the data collection makes the data controller the obligatory body to proceed with the anonymization of the data as required by art. 25 of the Regulation on personal data, as data that become "non-personal", as a process connected to the subsequent moment that determines the natural person where the data do not allow reaching the user and whoever generated them, thus falling under a different discipline of non-personal data that are freely transferable and assignable but perhaps not controllable from scratch.

4. Discriminatory Data, Functioning of the AI Systems

When we talk about discriminatory data, we immediately think of art. 9 Regulation of personal data which prohibits the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, as well as the processing of genetic data, biometric data intended to uniquely identify a natural person but also data relating to the health or sex life or sexual orientation of the person. The provision is not structured according to the current uses of artificial intelligence. By excluding the processing of data revealing racial origin or religious beliefs, it could indirectly assume this conformation, while using elements that are not in themselves discriminatory (Liakopoulos, 2020). It is a system that selects suitable candidates for a relative type of employment and high profile in the engineering field thus establishing a previous experience based on candidates who have already held that position in the past, who, hypothetically, will have the

title of study obtained in certain universities, a good knowledge of foreign languages and the consequent ability to take on managerial positions, the propensity to travel abroad frequently, a high degree mark, and experience in multinational companies operating in the sector (Liakopoulos, 2020).

The direct discrimination profile is an object of regulation of the data protection Regulation which discriminates indirectly and descending the use of data without a discriminatory nature at the origin substantially not regulated. The only normative element is the recital n. 71 of the Regulation on personal data which states that "in order to ensure fair and transparent processing with respect for the data subject, taking into account the specific circumstances and context in which the personal data are processed, it is appropriate that the data controller uses appropriate mathematical or statistical procedures for profiling, implements adequate technical and organizational measures in order to guarantee, in particular, that the factors that lead to inaccuracies in the data are corrected and the risk of errors is minimized and in order to ensure the security of personal data in a manner that takes into account the potential risks for the interests and rights of the data subject and that prevents, inter alia, discriminatory effects against natural persons on the basis of racial or ethnic origin, political opinions of religion or belief, trade union membership, genetic status, or state of health or sexual orientation, or of measures involving such effects" (Liakopoulos, 2020; Tinnirello, 2022). Reading the article just mentioned, we understand that is incomplete, expressed in a form that excludes a "preceptive character" of the same where data protection has some obvious gaps and the AI regulation is limited to predicting data of training that responds to certain principles that are free from errors and complete since all the adequate statistical requirements are not included and the result is not prevented as a product in itself discriminatory and in an involuntary way excluding candidates who do not possess certain specific characteristics. Sure, that the treatment complies with the provisions of art. 15 of the Regulation of personal data (right of access) which provides the related purposes of the processing, as well as the recipients for the data retention period, the rights that the interested party can exercise as well as the logic used and

the consequences of the automatic processing of use. And it is true that the regulation on personal data does not provide for a specific obligation for the owner to explain the operation of the AI system (Wachter, Mittelstadt & Floridi, 2017). The data controller provides information on the use of the data but does not clarify the relative modalities of a specific system of the AI to a certain result. The recital 71 of the Regulation on personal data in hypothetical way is limited to the data controller to provide the related information on the use of data and to clarify the related methods of a specific system of the AI which has reached a specific result. In any case, such treatment should be subject to adequate guarantees, which should include specific information to the interested party and the right to obtain human intervention, to express one's opinion, to obtain an explanation of the decision reached after such evaluation and to contest the decision. The very use of the "conditional" would seem to exclude the possibility for the interested party to directly invoke this right to explain the logic underlying the artificial intelligence system against the data owner (Wachter, Mittelstadt & Floridi, 2017).

Recital 71 in connection with articles 12, 13, 14 and 22 try to interpret the functionality of the Regulation on personal data. An obligation to the suppliers of the AI which according to art. 13, par. 1: "(...) high-risk AI systems are designed and developed in such a way as to ensure that their operation is transparent enough to allow users to interpret the system's output and use it appropriately (...)". The European legislator already knows that gaps in its legal system are still existing and that they have to do with the interpretation of the Regulation on personal data that seeks to resolve an ad hoc provision, such as a regulatory provision containing the rights of the interested in the processing of their data and which finds its place in the proposed Regulation on AI rather than an ad hoc modification of the Regulation of personal data.

5. Experimental Spaces

When we talk about experimentation spaces we are referring to the development of new AI systems and the related training of the data necessary for their functioning. The creation of the related open spaces allows more participants in the medium-sized enterprises and in the development of the systems of the AI who will not be able to participate due to the investments

that are needed in this area. Art. 53, par. 6, of the proposed AI regulation puts the specific experimentation of these spaces at the forefront as future guidelines that are issued and regulated by the European Artificial Intelligence Committee. The work and use of each body is to introduce the relative provisions that have to do with the rights and obligations, with the use of personal data and the functioning of the experimentation spaces of the AI systems. Art. 54 makes a relative exception to the proposal of the regulation of the AI which establishes the relative additional obligations that are connected with the companies participating in the experimentation of a space: “(...) separate, isolated and protected”, under the direct control of the trial participants and preventing access to third parties; the prohibition of data transmission outside the space; the obligation to delete the data once the trial has been completed; and finally, the preservation of an accurate description of the experimentation process and of the underlying logic (...) (Tinnirello, 2022). That is, a forecast that provides for the collection and processing of data for the experimentation spaces and takes place with a series of specific precautions.

What is foreseen by articles 15 and 20 (Regulation on personal data) which has to do with the rectification, cancellation, limitation and portability of data examine the certain additional precautions of a preparation of an experimentation space which focuses on the will of the legislator to regulate them by promoting the development of innovative AI systems. The derogation has a rigorous nature in space and time and corresponds to the relative choice of legislator. The rights of the interested parties according to the Regulation on personal data are absolute rights subordinated to needs of a collective nature where the public desire to have access to a certain information must be achieved with the rights and freedoms of others. The European legislator accepts the introduction of limited exceptions to a full protection of personal data by favoring the development of European industry by creating the relevant conditions for a wide exploitation of the AI technologies. These reflections affirm that the exception to the rights of the interested parties is limited, compatible with the overall functioning of the Regulation on personal data. This is an acceptable compromise that takes into consideration the EU's overall effort to close an

enriched gap towards other countries.

6. Concluding Remarks

As we have understood, the attempts for AI are complete and the course of the legislative process is quite evolutionary for the moment, hoping to see not so much the results in practice but a concrete use for the near future, clarifying the related critical aspects between the Regulations of the IA, of personal data and the use of the supplier who will verify the frequency in practice of the role he performs. The path of non-discrimination of the related data makes us think of art. 21 (Regulation on personal data) which: “(...) prohibits any form of discrimination (...)” as the basic principle that regulates certain settings of the algorithms that are introduced by the suppliers of the AI systems.

The use of algorithms produces discriminatory results in an indirect way. The European legislator provides some clarifications regarding the work, control of the data controller, as well as the functioning of the algorithm, as a product of a discriminatory result. Thus, it is clarified that the supplier and the data controller are on a path of a specific functioning that every time the European legislator intervenes to clarify the right of explanation for a specific system of the AI and the related reasons that it reaches a specific result. Art. 13 of the AI Regulation is too generic and there are no precise and stringent obligations to specify the information provided and to introduce a specific penalty system (Tinnirello, 2022). Article 71, par. 4 of the AI Regulation concerning the sanctions for the violation of the general obligations foreseen has to do only with the system provider and no foreseen sanction is included.

Finally, the disciplines that have to do with the AI sector in EU law are connected with those of a digital single market. In addition to the Regulation on personal data, we recall the Regulation 2018/1807 on non-personal data, the proposed regulation on artificial intelligence such as the Digital Markets Act, the Digital Services Act and the Digital Governance Act. Planning is very broad and distant, as a work of codification and coordination of this sector. In the near future, we also see cooperation of the sector with others but also with policies of the EU both at civil and criminal level. The final objective is the unblocking of the innovation of the related data industry which is found in every territory of the Member States where the

regulatory constraints are still many and the companies supplying digital services at a national level continue to favor their own development as a challenge for the next generations and as an active policy of the EU.

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