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HUMAN RIGHTS AND ARTIFICIAL INTELLIGENCE - INTERNATIONAL PUBLIC LAW AND CONSTITUTIONAL ASPECTS***

We are witnessing that society and social relations are changing particularly rapidly in the last few decades. Evidently, it is a continuous trend that places numerous challenges before the law. One of those aspects is the development of artificial intelligence, which has a special impact on the matter of human rights, in its international public law and constitutional aspects. The authors in this paper pay special attention to three groups of questions. The first deals with the current normative situation in this area and potential problems in that sense. The second group of questions refers to possible problems that could arise in the future, which, to the extent possible, are perceived by the authors themselves. The third is the consideration of these issues, from the aspect of the situation in the Republic of Serbia and in Europe.

Keywords: human rights, artificial intelligence, international public law, constitutional law.

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1. INTRODUCTION

Despite its expanding presence across numerous aspects of our lives, there is no extensively accepted description of artificial intelligence (Reddy, 2022, pp. 1–44). John McCarthy and colleagues first coined the term “artificial intelligence” in 1956. They described it as follows: “An attempt will be made to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves (...). For the present purpose, the artificial intelligence problem is taken to be that of making a machine behave in ways that would be called intelligent if a human were so behaving.” (Lee, 2022, p. 6). AI is the simulation of intelligence processes by machines, especially computer systems. As some authors say (Reddy, 2022, p. 4), artificial intelligence (AI), in other words, Computer Wisdom, is one analogous technical field that's converting society into one among robots and machines. AI includes machine knowledge, language processing, big data analytics, algorithms, and far more. This term is used in a broad manner in diverse contexts. The Oxford Dictionary defines AI as “the theory and development of computer systems able to perform tasks normally requiring human intelligence” (Lee, 2022, p. 1). Nicolau (2019, p. 64) stated that artificial intelligence is a smart digital system that learns on its own, develops its own search and learning systems, can even have its own language without being understood by humans, develops its own artificial neural networks, can write its own programs, but most important is the fact that it has decision-making power. Depending on the knowledge it has, it can decide the actions that it does or does not do, being able to predict their result. In other words, AI is no longer dependent on human command.

As some other authors say (Muller, 2020, p. 3) artificial intelligence systems are software and possibly also hardware systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best actions to take to achieve the given goal. Often, AI is described as a collection of technologies that combine data, algorithms and computing power. OECD defines an artificial intelligence system as a machine-based system that is designed to operate with varying levels of autonomy and that can, for explicit or implicit objectives, generate output such as predictions, recommendations, or decisions influencing physical or virtual environments. Anyway, AI has immense potential to enhance human capabilities and improve decision-making processes (Al-Taj, Polok & Rana, 2023, p. 94). As Quintavalla and Temperman claimed (2023a, p. 569), the use of artificial intelligence has considerably affected most, if not all, domains of human life, cause AI has a myriad of applications that have already been introduced into society: biometric recognition, object recognition, risk and success prediction, algorithmic decision making or support, automatic translation, recommender systems, and so on. These applications have found their way into sectors such as law enforcement, justice, human resource management, financial services, transport, healthcare, public services (Muller, 2020, p. 3).

As a consequence of all these processes, some authors (Quintavalla & Temperman, 2023b, p. 4) say that artificial intelligence and human rights are currently interacting within one and the same world and their inevitable dynamics no longer goes unnoticed, though such dynamics simultaneously poses tremendous and tremendously pertinent legal, ethical, technological, and societal questions. Human rights are essential to all or any people, regardless of the race, commerce, nation, language, religion, or the other status (Reddy, 2022, p. 4) and in Western thought, they are regarded as the supreme norm of law and form the basis for most legal systems. According to the majority of experts on international law, human rights are not merely an enumeration of individual rights, but rather form a self-contained regime. The integral pillar of this regime is an anthropology based on the self-determination and autonomy of the human being. According to this understanding, human rights oblige the state and other social organizations to observe certain principles and procedures when dealing with subordinates (Kriebitz & Lütge, 2020, p. 86). As Quintavalla and Temperman stated (2023a, p. 569), the relationship between AI technology and human rights is a web of multilateral coexisting relationships. Human rights principles can provide an effective standard for measuring the societal acceptance of AI technology. Human rights can have an impact on AI, as well. AI technology and human rights can be in principle both friends and foes. However, it is the society which decides what type of impact AI technology makes, that is, whether it will become a friend or a foe of human rights.

Back in the history, both early artificial intelligence milestones and the modern human rights codification process have their origins in the 1940s. In the 1940s, important early AI foundations saw the light of day, while on 10 December 1948, the General Assembly of the newly founded United Nations created as per the 1945 UN Charter and aiming to prevent the atrocities the League of Nations helplessly failed to avert, adopted the Universal Declaration of Human Rights (UDHR), positing in the Preamble that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (Quintavalla & Temperman, 2023b, p. 3). The UDHR, consisting of a combination of civil and political rights on the one hand, and social, economic, and cultural rights on the other, serves as the milestone for contemporary human rights instrument up until today, also influencing numerous subsequent international and national bills of rights. Their overlapping history notwithstanding the fact that the two phenomena, AI and human rights, led fairly separate existences for their first fifty or sixty years or so. It is only in the last decade that their paths have converged, that the two forces meet, that they support each other, or, as may happen as well, that they conflict, causing small or major clashes (Quintavalla & Temperman, 2023b, p. 3).

2. INTERNATIONAL PUBLIC LAW AND AI

As some authors say (Martsenko, 2022, p. 317), the legal regulation of AI requires the hard work of lawyers both at the global and regional levels. Some others claim (Lane, 2022, p. 918) that the ongoing development of AI technologies presents international law with a number of challenges. These include the need for new laws, legal certainty,

incorrect scope of existing laws and legal obsolescence. There are, however, several important initiatives that could have an impact on the protection of human rights and contribute to clarifying applicable standards (Lane, 2022, p. 927). Within international fora, pioneering benchmarking has gradually commenced in the form of guidelines and recommendations at both international and regional levels (Quintavalla & Temperman, 2023b, p. 4). Discussion related to the impact of AI on human rights has been present in global forums for many years. In 2021 UN Commissioner for Human Rights said countries should expressly ban AI applications that did not comply with the international human rights law (Al-Taj, Polok & Rana, 2023, p. 97).

AI-related concerns into that framework have so far been piecemeal and fragmented. Despite pleas to update international law in light of AI challenges, international organizations have not produced binding treaties; instead, they have issued multiple resolutions and directives to address business responsibility, data governance, privacy, and so on. The United Nations system offers a broad range of applicable, if vaguely defined, rights that can be interpreted as AI-relevant. Already mentioned, the Universal Declaration of Human Rights is broadly cited as a generic, flexible, and agreed-upon document to derive a set of rights and obligations for the age of AI. The Declaration is an intentionally generic document; thus, the specification of rights and obligations is left to other instruments. The International Covenant on Civil and Political Rights comes closest to an international treaty capable of anticipating some of the concerns around today's new and emerging technologies, AI included. Finally, arguably, the most consequential document from the standpoint of regulating private business is a set of guidelines: as calls to consider businesses alongside state actors as duty-bearers with human rights obligations has gained traction in the recent past, the UN Guiding Principles on Business and Human Rights (2011) have stepped in to set the standards for the roles and responsibilities of businesses with implications for their development and deployment of technology (Bakiner, 2023, p. 4). The Universal Declaration of Human Rights is an absolute cornerstone of the human rights regime and is considered the most significant human rights document. Thus, already during the work on the declaration, the international community noticed the need to prepare binding documents. This task was completed in 1966 when the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) were adopted by the UN General Assembly. These documents are known by the collective name International Bill of Human Rights (Al-Taj, Polok & Rana, 2023, p. 95). Another important example is the work of the UN Educational, Scientific and Cultural Organization (UNESCO). UNESCO appointed a group of 24 experts to draft a "Recommendation on the Ethics of Artificial Intelligence," to provide "an ethical guiding compass and a global normative bedrock allowing to build a strong respect for the rule of law in the digital world." After receiving input from various stakeholders on earlier drafts, the final text of the Recommendation was adopted in November 2021. Although framed as an ethics-based initiative, an objective of UNESCO's Recommendation is "to protect, promote and respect human rights and fundamental freedoms, human dignity and equality," (Lane, 2022, p. 930).

2.1. Regional Initiatives and AI

At the regional level, the European Union (EU) has taken the lead in legislating digital and AI regulation. Thus, in Resolution 2015/2103 (INL) of the European Parliament dated 16 February 2017 with the recommendations of the European Commission on the civil law regulation of robotics, which is not a universally binding act, it is indicated that at this stage of technology development, AI should be recognized as the only object of social relations (Martsenko, 2022, p. 322). In terms of legally binding instruments, the European Union General Data Protection Regulation (GDPR) is perhaps the most obvious example. Like many initiatives targeting privacy and data protection, the GDPR is not specific to AI, but applies more generally to data processing activities. Aiming to protect Europeans from the privacy risks of data-intensive technologies, the GDPR includes punitive *ex post* regulation with the principle of data protection by design and Data Protection Impact Assessment plans. The EU has also developed the well-known Ethics Guidelines for Trustworthy AI, adopted by the High-Level Expert Group on Artificial Intelligence established by the European Commission. The Guidelines set out seven requirements for trustworthy AI, based on four ethical principles (Roumate, 2021, p. 6; Lane, 2022, p. 932). In April 2021, the European Commission published the draft “Artificial Intelligence Act” which sets out a proposed legal framework for AI. The proposed Act aimed to ban a small number of AI systems that pose unacceptably high risks to fundamental rights while mitigating the risks arising from other systems through a mixture of *ex ante* impact and conformity assessments and *ex post* penalties. The Artificial Intelligence Act was built on ethics-based initiatives such as the Ethics Guidelines for Trustworthy AI and the Resolution on a Framework of AI Ethics. The goal of this initiative is to prepare European countries for the tangible and intangible impact of artificial intelligence, ensured by a European ethical and legal framework. Within the Council of Europe, the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data is also noteworthy. The instrument is not an AI initiative *per se* but, similar to the GDPR, it would have an impact on some aspects of the development and deployment of AI (Roumate, 2021, p. 6; Lane, 2022, p. 932; Bakiner, 2023, p. 4). Lane claimed (2022, p. 935) that the Protocol takes the approach typical of the Council of Europe in placing positive obligations on State Parties which include the obligation to ensure the protection of individuals from violations by the private sector.

On 22 May 2019, the OECD adopted a recommendation on AI. The Recommendation consistent with value-based principles also provided five recommendations. Only 40 countries have adopted these principles including 36 OECD member countries, including the world’s major economies, but excepting China and six non-member countries (Cataleta, 2021, p. 19; Roumate, 2021, p. 5). In 2019, the Council of Europe created an *ad hoc* Committee on AI (CAHAI), which is working on the feasibility and potential elements based on broad multi-stakeholder consultations, of a legal framework for the development, design, and application of artificial intelligence, based on the Council of Europe’s standards on human rights, democracy and the rule of law (Roumate, 2021, p. 6).

Recently, the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law was adopted on 17 May 2024 by the Committee of Ministers of the Council of Europe at its 133th Session held in Strasbourg, and will be opened for signature at the Conference of Ministers of Justice in Vilnius on 5 September 2024 (Committee on Artificial Intelligence (CAI)). With the formal adoption by the Committee of Ministers, the Framework Convention is now definitely the first binding international treaty on AI and waiting to be signed and ratified by countries. In contrast to hopes and fears to the contrary, the negotiating parties have neither intended to create new substantive human rights nor to undermine the scope and content of the existing applicable protections. The intention of the parties negotiating the instrument has been to make sure that each party's existing protection levels of human rights, democracy and rule of law would also apply to current and future challenges raised by AI. In addition to the 46 Council of Europe member States, a number of countries from several regions (Argentina, Australia, Canada, Costa Rica, the Holy See, Israel, Japan, Mexico, Peru, Uruguay and the United States) participated in the negotiations, along with the European Union. In addition, the process was set up in an inclusive manner with many CoE bodies, other IGOs such as the OECD, OSCE, UNESCO and around 70 representatives from civil society, business and the technical and academic community actively participating and using the ability to make comments and text proposals to the draft treaty until the very last day of the negotiations (Committee on Artificial Intelligence (CAI)).

The Framework Convention formulates fundamental principles and rules which not only safeguard human rights, democracy and the rule of law but at the same time are conducive to progress and technological innovations. It is complementary to the already existing international human rights, democracy and rule of law standards and aims at filling-in any legal gaps that may have formed as a result of rapid technological advances in the sphere of human rights law but also with regard to the protection of democracy. Given the high level at which it is operating and in order to remain future-proof, the Framework Convention does not regulate technology and is essentially technology neutral. The Framework Convention and its implementation should follow the logic of a graduated and differentiated approach, in view of the severity and probability of adverse impacts on human rights, democracy and the rule of law (Committee on Artificial Intelligence (CAI)). It sets out a legal framework that covers AI systems throughout their lifecycles, from start to end, and will be a global instrument, open to the world. After its adoption, countries from all over the world will be eligible to join it and meet the high ethical standards it sets (Council of Europe, 2024).

In Asia, no instruments have been adopted by the Association of South East Asian Nations (ASEAN) but various national initiatives have been adopted within this region. The same can be said regarding the Inter-American human rights system (Lane, 2022, p. 936). In Africa, we can find the declaration by the African Union's Working Group on AI, adopted by African ministers responsible for communication and information and communication technologies (CICT) in Egypt on 26 October 2019 (African Union). This important legal framework confirms that international society is dedicated to the importance of ethics in AI, including the development of rules and strategic actions to face challenges imposed by AI and the importance of updating international law in the age of AI (Roumate, 2021, p. 7).

3. CONSTITUTIONAL – STATE LAW AND AI

As some authors (Pollicino & De Gregorio, 2021, p. 5) say, new technologies have always challenged, if not disrupted, the social, economic, legal, and, to a certain extent, ideological *status quo*. Such transformations impact constitutional values, as the state formulates its legal response to new technologies based on constitutional principles which meet market dynamics, and as it considers its own use of technologies in light of the limitation imposed by constitutional safeguards. Constitutions have been designed to limit public, more precisely governmental powers, and protect individuals against any abuse from the state. The shift of power from public to private hands requires rethinking and, in case, revisiting some well-established assumptions. In recent years, however, the rise of the algorithmic society has led to a paradigmatic change where public power is no longer the only source of concern for the respect of fundamental rights and the protection of democracy. This requires either the redrawing of the constitutional boundaries so as to subject digital platforms to constitutional law or to revisit the relationship between constitutional law and private law, including the duties of the state to regulate the cybernetic complex, within or outside the jurisdictional boundaries of the state. Within this framework, the rise of digital private powers challenges the traditional characteristics of constitutional law, thus encouraging to wonder how the latter might evolve to face the challenges brought by the emergence of new forms of powers in the algorithmic society (Pollicino & De Gregorio, 2021, p. 6).

We need to be aware of one more fact, which is of the utmost importance. Namely, constitutional law, i.e. *materia constitutionis*, has one characteristic, which is conservatism. In other words, constitutional law will react only in the case that the basic values of a legal order cannot be ensured or protected, by norms which are below the constitution. We have to keep in mind that AI is something new, when we speak about the law. So, it is fully expected that the constitutional norms do not yet fully recognise it. However, at the same time, this does not mean that human rights are not protected when it comes to artificial intelligence. On the contrary, constitutional law ensures the protection of human rights through the general regime of human rights protection within democratic systems. Bearing that in mind, in that interim period, it should be emphasized that an extremely important and active role can be expected from the courts, especially the constitutional courts, which should set clear boundaries.

In the meantime, a number of countries have now adopted national strategies concerning AI, and some of these have adopted legislation. However, some instruments include more general references to the protection of human rights, such as in Australia, New Zealand and Germany which also contain standards that can have an impact on the protection of human rights without being framed as such. Other states, such as the United States, China and the United Kingdom are also working on regulatory frameworks, though without having produced coherent legal frameworks so far. Private institutions have contributed to the gradual formation of more de-centralized regulatory schemes, although they cannot be substitutes for fully elaborated, legal schemes (Tzimas, 2020, p. 549; Lane, 2022, p. 940). Other legislative initiatives have been taken at

the subnational level, such as legislation adopted in Washington State in the US regarding governmental use of facial recognition and a bill concerning discrimination and the use of automated decision-making. Overall, many countries are making strides in the introduction of legislation or regulation concerning AI, including through the adoption of national AI strategies, and non-binding national measures sometimes reference the broad range of human rights found at the international level. This is positive, but beyond data protection and privacy, the protection of human rights has not yet been thoroughly embedded in national legislation related to AI. Nonetheless, there are some positive contributions that enhance legal certainty for both States and businesses in the national initiatives (Tzimas, 2020, p. 549; Lane, 2022, p. 940). In Serbia, the importance of artificial intelligence is recognized at the state level. In this sense, significant steps are being taken in order to keep pace with world and European trends. The Working Group for Drafting the Artificial Intelligence Law of the Republic of Serbia was formed. The formation of the Working Group marks the beginning of a significant process in drafting the Artificial Intelligence Law. The Working Group comprises representatives from various government bodies, the scientific and professional community, law firms, and business entities involved in the field of artificial intelligence. The participation of a large number of experts from diverse fields aims to ensure a comprehensive view of all aspects of AI regulation (National AI Platform, 2024).

4. CONCLUSION

It is more than evident that fundamental rights and democratic values seem to be under pressure in the information society (Pollicino & De Gregorio, 2021, p. 10). The ongoing development of AI technologies presents international law with a number of challenges (Lane, 2022, p. 940). On one hand, when we talk about the legal steps, especially the constitutional ones, one must consider that enactment takes many years. This is alarming considering the fact that over the course of a decade two entire technological generations can pass. As the matter of fact, the pace of regulatory change is too slow to keep up with that of technology. It is evident that regulatory systems are always outdated in respect of technological progress (Cataleta, 2021, p. 9). Future discussion, therefore, should take up this issue and provide clarity to it as soon as possible. Overall, transformation of law should not be delayed any further. AI technologies and machines are progressing by leaps and bounds while the legal norms applicable to them are either stuck in the analogue age or are moving forward at snail's pace. It should be changed before it is too late (Lee, 2022, p. 261).

On the other hand, technology is also an opportunity, since it can provide better systems of enforcement of legal rules but also a clear and reliable framework compensating the fallacies of certain processes. Indeed, new technologies like automation should not be considered as a risk *per se*. At the same time, it is well-known that hard law can represent a hurdle to innovation, leading to other drawbacks for the development of the internal market, precisely considering the global development of algorithmic technologies (Pollicino & De Gregorio, 2021, p. 12). Technologies may contribute

to the advancement of human rights. For instance, the use of machine learning (ML) in healthcare could improve precision medicine and eventually provide better care to patients. On the other hand, they can pose an obvious risk to human rights. In other words, AI presents both benefits and risks (Quintavalla & Temperman, 2023b, p. 4). As Quintavalla and Temperman stated (2023a, p. 570), it is very difficult to account for all the consequences that the development and deployment of a given AI application can have on human rights protection.

Therefore, a fully harmonised approach would constitute a sound solution to provide a common framework and avoid fragmentation, which could undermine the aim of ensuring the same level of protection of fundamental rights. Besides, coregulation in specific domains could ensure that public actors are involved in determining the values and principles underpinning the development of algorithmic technologies while leaving the private sector room to implement these technologies under the guidance of constitutional principles. The principle of the rule of law constitutes a clear guide for public actors which intend to implement technologies for public tasks and services. To avoid any effect on the trust and accountability of the public sector, consistency between the implementation of technology and the law is critical for legal certainty. Nonetheless, it is worth stressing that this is not an easy task (Pollicino & De Gregorio, 2021, p. 13).

Most notably, it is necessary to design a frame that describes the relationship between the three parties: platforms, states, and individuals. In other words, a *digital habeas corpus* of substantive and procedural rights should be identified, which can be enforced by the courts as they are inferred from existing rights protected under current digital constitutionalism (Pollicino & De Gregorio, 2021, p. 20). This is why it is critical to understand the role of regulation in the field of artificial intelligence, where cooperative efforts between the public and private sector could lead to a balanced approach to risk and innovation (Pollicino & De Gregorio, 2021, p. 24). Given their importance for institutionalizing justice and expressing as well as preserving the human focus of the rule of law, human rights can set the ultimate checks and balances regarding AI development. More specifically, the suggestion is that human rights can and must contribute to a regulatory framework promoting “friendly” AI and prohibiting undesirable as well as enabling desirable AI developments and applications (Tzimas, 2020, p. 549).

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