

The European Convention of Human Rights and the EU Charter: Effective Legal Protection Against Abuse of AI in Public Domain?

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Towards eXplainable Artificial Intelligence (XAI) in Taxation:

The Future of Good Tax Governance

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10 March 2023

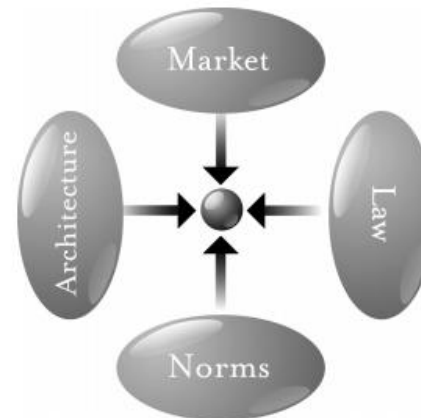
Overview

- Abuse of AI
- ... in the public domain
- Effective legal protection
 - ECHR
 - EU Charter
- Conclusions



The power of AI

- Code is Law
 - Automation of choice and decision making
 - Reproducibility
 - Less human interaction
 - Control
 - Speed
 - Data gathering



The abuses of AI

Inconclusive Evidence – Causal connections

Inscrutable Evidence – Opacity

Misguided Evidence – Garbage in, Garbage out

Unfair outcomes – Discrimination

Transformative Effects – Appears neutral

Traceability – Accountability

The abuses of AI

Cyber security vulnerabilities – Protecting humans

AI as human? – Legal Personhood

New or old frontiers in liability for damages?

AI in job market – Adverse effects on workers

Intellectual Property – Who owns AI creations?

Mass Surveillance – Privacy

The (ab)use of AI in the public domain: A New Lev(AI)than?

One is of the state as a clunky, bureaucratic, slow, and inefficient entity, likely to err either in identifying the goals for its intervention or in enlisting the optimal means for achieving them (or both) because it is too weak. ***The opposing image is that of the state as a tough, muscular, and highly powerful entity-a Leviathan-likely to overkill. While these two images seem to conflict, they appear to generate a similar attitude in favor of curbing the role of the state.'***

Eldar Haber & Amnon Reichman, 'The User, the Superuser, and the Regulator: Functional Separation of Powers and the Plurality of the State in Cyber' (2020) 35 Berkeley Tech LJ 431

The (ab)use of AI in the public domain: A New Lev(AI)than?

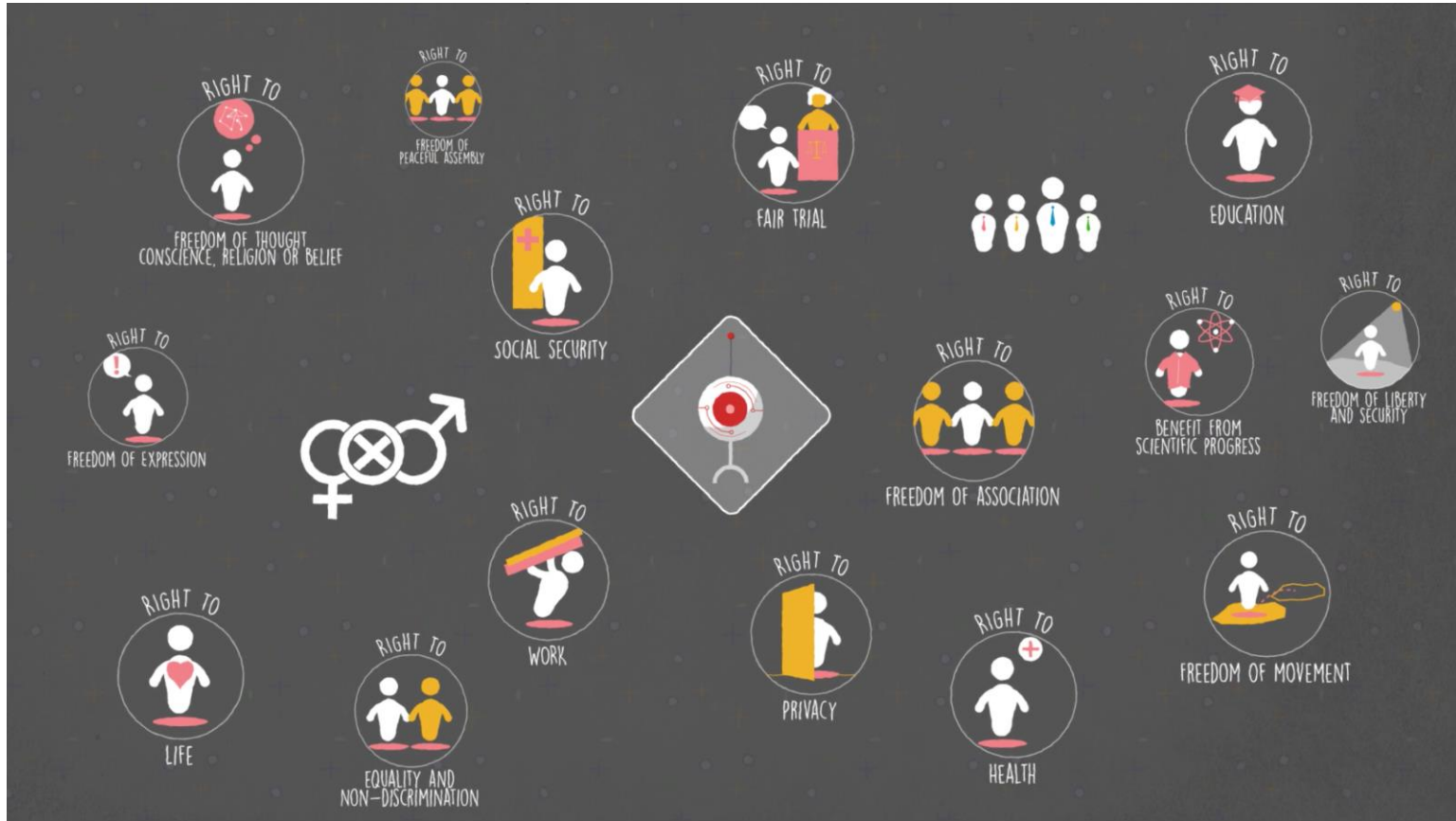
- 176 countries globally are actively using AI technologies for surveillance purposes. This includes: smart city/safe city platforms (fifty-six countries), facial recognition systems (sixty-four countries), and smart policing (fifty-two countries).
- Some autocratic governments—for example, China, Russia, Saudi Arabia—are exploiting AI technology for mass surveillance purposes.
- Other governments with dismal human rights records are exploiting AI surveillance in more limited ways to reinforce repression.
- Yet all political contexts run the risk of unlawfully exploiting AI surveillance technology to obtain certain political objectives.

The (ab)use of AI in the public domain: A New Lev(AI)than?

- “In human rights discourse for instance, the term ‘vulnerability’ is used to indicate a heightened susceptibility of certain individuals or groups to being harmed or wronged by others or by the state. Populations which are particularly prone to being harmed, exploited or discriminated include, among others, children, women, older people, people with disabilities, and members of ethnic or religious minority groups.”
- “This does not mean that these groups are being elevated above others. *Characterizing them as ‘vulnerable’ simply reflects the hard reality that these groups are more likely to encounter discrimination or other human rights violations than others.*”

[Andorno, 2016]

AI vulnerabilities and FRs



AI in the Tax Domain

- In France, to improve the detection process of undeclared constructions or developments, the French tax administration uses AI and data enhancement based on aerial photographs taken by the *Institut national de l'information géographique et forestière* (IGN)
- In Sweden, the TAs have been using AI in the registration of companies since May 2021. This AI-based service classifies requests based on a set of established risk factors, and then the requests are processed in different ways, depending on the assigned category

Challenges

- Mass surveillance
- Jobs
- Trust
- Right to an explanation
- Enhanced coercion
- Non-discrimination
- Remedies against inscrutable data



Effective Legal Protection against abuses of AI in the public domain under the ECHR

Article 1 of Protocol No. 1 ECHR

- Every natural or legal person is entitled to the **peaceful enjoyment of his possessions**. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- **The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.**

Article 13 ECHR

- Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an **effective remedy** before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

How does an effective remedy to challenge public action using AI look like?

Article 14 ECHR

- The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

How to deal with the bias intrinsic
in data and algorithms?

Article 14 ECHR in tax matters

Darby v Sweden [1990]

- No legitimate aim in respect of a measure reserving the right to exemption from church tax only to persons formally registered as residents in the respondent State on the ground that the case for reduction could not be argued with the same force in regard of persons who were not resident as it could in regard to those who were, and that the procedure would be more complicated if the reduction was to apply to non-residents

Guberina v Croatia [2016]

- The domestic authorities **failed to take account of the needs** of a child with disabilities when determining his father's eligibility for tax relief on the purchase of suitably adapted property.
- The Court found that the discriminatory treatment of the father on account of the disability of his child was a form of disability-based discrimination.

Frantzeskakis and Others v Greece [2019]

- Taxpayers who had not challenged a social contribution before it was declared unconstitutional were not in a comparable situation to those who had taken this bold initiative as regard the retroactive reimbursement of said social contribution

Arbitrariness on factors +
Transparency+ Explainability +
Justification?

Article 8 ECHR

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2. **There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society** in the interests of national security, public safety or the **economic wellbeing of the country, for the prevention of disorder or crime**, for the protection of health or morals, or for the protection of the rights and freedoms of others.

- How much data should be used by public authorities?
- For how long should the data be stored?

Article 8 ECHR in tax matters

Kesslay v France [2002]

- Home searches based on reasoned order setting out the matters of fact law to find evidence of tax evasion are compatible with Article 8 ECHR

Rousk v Sweden [2013]

- It will sometimes be necessary for a member State to attach and sell an individual's home in order to secure the payment of taxes due to the State. However, these measures must be enforced in a manner which ensures that the individual's right to his or her home is respected. In a case concerning the conditions of an enforced sale at auction of a house, to repay a tax debt, the Court found a violation because the owner's interests had not been adequately protected

Bernh Larsen Holding AS and Others v. Norway [2013]

- As regards the extent of the tax authorities' powers of investigation regarding computer servers, for example, the Court has emphasised the public interest in ensuring efficiency in the inspection of information provided by applicant companies for tax assessment purposes and the importance of the existence of **effective and adequate safeguards against abuse by the tax authorities**

Remedies against surveillance and personal data retention

Klass and Others v. Germany [1978]

- The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. **This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.**

Interference = Strength of safeguards

Remedies against surveillance and personal data retention

Roman Zakharov v. Russia [2015]

- In the field of covert surveillance measures, where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge, **judicial control** offering the best guarantees of independence, impartiality and a proper procedure.
- As soon as **notification can be carried out without jeopardising the purpose of the restriction, after the termination of the surveillance measure, information should be provided to the persons concerned.**
- To enable that person to obtain a review of the proceedings concerning the interference with the exercise of his or her right to private life it is in **principle necessary to provide that individual with a minimum amount of information on the decision that could be challenged**, for example its date of adoption and the authority from which it emanates.

(See also İrfan Güzel v. Turkey, 2017, §§ 96 and 98-99).

- Notification of the surveillance v effectiveness of the monitoring
- Minimum amount of information that could be challenged → what information?

Effective Legal Protection against abuses of AI in the public domain under the EU Charter

Article 51 of the EU Charter

- 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States **only when they are implementing Union law. They shall therefore respect the rights**, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
- 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 41 of the EU Charter

- 1. Every person has the right to have his or her affairs **handled impartially, fairly and within a reasonable time** by the institutions, bodies, offices and agencies of the Union.
- 2. This right includes:
 - (a) the right of every person **to be heard**, before any individual measure which would affect him or her adversely is taken;
 - (b) the right of every person to have **access to his or her file**, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - (c) the obligation of the administration to **give reasons** for its decisions.
- 3. Every person has the right to have the Union **make good any damage** caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
- 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 8 of the EU Charter

- 1. Everyone has the right to the protection of personal data concerning him or her.
- 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of **access to data which has been collected concerning him or her, and the right to have it rectified.**
- 3. Compliance with these rules shall be subject to control by an independent authority.

- How much data should be used by public authorities?
- For how long should the data be stored?

Article 47 of the EU Charter

- Everyone whose rights and freedoms guaranteed by the law of the Union are violated has **the right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article.
- Everyone is entitled to a **fair and public hearing** within a reasonable time by an **independent and impartial tribunal** previously established by law. Everyone shall have the possibility of being advised, defended and represented.
- Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

How does an effective remedy to challenge public action using AI look like?

Article 47 of the EU Charter in tax matters

WebMindLicenses Kft, C-419/14 [2015]

- Para 68: It follows that EU law does not preclude the tax authorities from being able in the context of an administrative procedure, in order to establish the existence of an abusive practice concerning VAT, **to use evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, provided that the rights guaranteed by EU law, especially by the Charter, are observed.**

- Which data to use?
- Data on criminal records?

Article 47 of the EU Charter in tax matters

SC Cridar Cona C-582/20 [2022]

- Para 52: selon une jurisprudence constante de la Cour, l'effectivité du contrôle juridictionnel garanti par l'article 47 de la Charte exige que l'intéressé puisse connaître les motifs sur lesquels est fondée la décision prise à son égard soit par la lecture de la décision elle-même soit par une communication de ces motifs faite sur sa demande, sans préjudice du pouvoir du juge compétent d'exiger de l'autorité en cause qu'elle les communique, afin de **lui permettre de défendre ses droits dans les meilleures conditions possibles et de décider en pleine connaissance de cause s'il est utile de saisir le juge compétent**, ainsi que pour mettre ce dernier pleinement en mesure d'exercer le contrôle de légalité de la décision nationale en cause [...]

- Access to data and algorithm?
- Explainability + Justification

Article 47 of the EU Charter in tax matters

État du Grand-duché de Luxembourg v L [2021]

- Para 92: However, it must be borne in mind, in that respect, that if the judicial review guaranteed by Article 47 of the Charter is to be effective, **the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based**, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information, so as to make it possible for him or her to defend his or her rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question [...].

Article 47 of the EU Charter in tax matters

État du Grand-duché de Luxembourg v L [2021]

- Para 94: Furthermore, the Court has also recalled that it follows from settled case-law that the essence of the right to an effective remedy enshrined in Article 47 of the Charter includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to **consider all the issues of fact and of law that are relevant for resolving the case before it, without being compelled to infringe a legal rule or obligation or be subject to the penalty attached to that offence [...]**

Article 47 of the EU Charter and AI

Lingues des droits humaines, C-817/19 [2022]

- Para 195: As observed, in essence, by the Advocate General in point 228 of his Opinion, given the opacity which characterises the way in which artificial intelligence technology works, it might be impossible to understand the reason why a given program arrived at a positive match. **In those circumstances, use of such technology may deprive the data subjects also of their right to an effective judicial remedy enshrined in Article 47 of the Charter**, for which the PNR Directive, according to recital 28 thereof, seeks to ensure a high level of protection, in particular in order to challenge the non-discriminatory nature of the results obtained.

Prepared by Dr. Giulia Gentile and Professor Andrew Murray

These complexities linked to the fuzziness of AI could be tackled **by imposing a general legal duty to provide explainability techniques** when designing and marketing AI systems. Nevertheless, due to the highly complex and fragmented AI landscape, clearly stipulating what techniques should be imposed on AI systems appears difficult, if not impossible. Different explainability techniques may be best suited for different AI usages.

Thank you for your attention