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EDITORIAL FOREWORD: REVISTA DE DREPT CONSTITUTIONAL/ CONSTITUTIONAL LAW REVIEW (RDC) A DECADE OF ACADEMIC PRESENCE

On the occasion of its tenth anniversary, *Revista de Drept Constitutional/ Constitutional Law Review (RDC)* reaffirms – with dedication and a sense of shared accomplishment – its role within the Romanian and international academic landscape as the only specialized publication in the field of constitutional law in Romania.

This Journal was born from the initiative to revive the *Bulletin of the Constitutional Court* – a publication to which I had the honour of contributing significantly in 2009, during my tenure as a judge at the Court, on the occasion of a major international conference of Constitutional Courts. This revival followed a period of editorial silence after earlier editions published in 1999, 2000, 2002, 2003, and 2004. In 2015, while still serving as a constitutional judge, I submitted a proposal to the Plenum to transform the *Bulletin* into a *Constitutional Law Review*. The aim was to broaden the scope of scientific research in constitutional law – both national and comparative – to facilitate access to publication for scholars from Romania and abroad, and to secure the journal's indexing in academic databases. This initiative reflected our commitment to advancing constitutional dialogue through scholarly dissemination. However, the proposal was not approved, as the preference was to preserve the specific profile of the Court's publication as a *Bulletin of Jurisprudence*.

While fully understanding the importance of preserving the distinctive character of the Constitutional Court's *Bulletin* as a tool for disseminating its case law, the idea of a new publication began to take shape – one that would serve as an open window for constitutional law scholarship, as well as for the publication of annotated case law. Embracing this vision, Professor Marieta Safta – whose support I gratefully acknowledge – joined the initiative as co-editor of the new journal, *Revista de Drept Constituțional/ Constitutional Law Review*. From the very beginning, RDC was conceived as an intellectual project aimed at fostering critical thinking, doctrinal balance, and analytical rigor in the study of constitutional law.

Over the past decade, the *RDC* has evolved organically, consolidating its identity and reputation. Today, the Journal is indexed in eight relevant international databases: DOAJ (Directory of Open Access Journals), EBSCOhost, HEINONLINE, Central and Eastern European Online Library, Scilit, Crossref, WorldCat, and ASCI. It employs DOI identifiers for published articles and adheres to international standards of scientific publishing, also being registered with the Romanian State Office for Inventions and

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Trademarks (OSIM). These benchmarks serve not only as indicators of quality but also as expressions of the founding commitment: to promote a substantive, open, and honest academic publication.

The Journal consistently attracts interest from both Romanian and international authors, providing an attractive platform for the dissemination of research in the field of constitutional law. Its open-access model and absence of publication fees make the RDC a truly transparent and equitable channel for advancing doctrinal ideas and solutions.

Particular emphasis has been – and will continue to be – placed on supporting young researchers, who find within the pages of the Journal a professional framework for academic affirmation. Sections devoted to case law analysis and book reviews encourage early scholarly efforts, while the rigorous and constructive peer review process offers valuable guidance for professional development.

Looking to the future, the *Revista de Drept Constitutional/Constitutional Law Review (RDC)* sets forth the following objectives:

- Strengthening its position within the specialized editorial landscape and expanding its international indexing;
- Continuously modernizing its digital platform to foster vibrant dialogue among authors, readers, and reviewers;
- Diversifying academic topics and formats in line with the challenges of contemporary constitutional law;
- Enhancing its scientific prestige in a spirit of rigor, balance, and international openness.

We are honoured by the trust of those who have supported us throughout this decade – authors, reviewers, collaborators, and readers – and we extend our sincere gratitude to all.

Special thanks are also due to *Universul Juridic* Publishing House.

As co-editors, we firmly believe that the *Constitutional Law Review* will continue to serve as a benchmark of specialized scholarship, a credible and balanced voice faithful to the standards of legal research and the ideals of a robust constitutional culture. The coming years will carry forward the work and commitment of all those who have contributed to this endeavour.

Founders and Co-Editors,
Professor Dr. Tudorel TOADER
Professor Dr. Marieta SAFTA

Articles. Analysis and reflections

REMEDIES AGAINST DISCRIMINATORY DECISIONS TAKEN OR PREPARED BY ARTIFICIAL INTELLIGENCE SYSTEMS EUROPEAN UNION, COUNCIL OF EUROPE AND THE VENICE COMMISSION'S APPROACHES¹

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Abstract

The increasing integration of AI systems into decision-making processes across both private and public sectors, driven by efficiency and cost reduction, presents significant human rights challenges, particularly concerning discrimination. As Large Language Models advance, non-technical users can easily obtain useful results, but these must be thoroughly checked for errors and AI hallucinations. Many high-risk AI applications, as defined by the EU AI Act, can directly impact human rights in areas such as education, employment, healthcare, credit assessments and even the judiciary. While human oversight is often required, it may quickly devolve into superficial plausibility checks, leading to a high risk of perpetuating bias present in AI training data.

On the basis of recommendations from the Venice Commission, this article highlights the need for individuals to have to access training data when appealing biased AI-based decisions. It suggests that specialised experts or civil society organisations, potentially using AI themselves, will likely be crucial in establishing such proof. The EU AI Act establishes a right to explanation for high-risk AI-based decisions and it mandates AI providers to maintain documentation on data type, origin, and curation methodologies of AI training. As individual decisions will typically refer to personal data, the General Data Protection Regulation (GDPR) provides additional complaints. For non-EU Member States ratifying the Council of Europe Framework Convention on Artificial Intelligence, adopting similar rules on training data documentation will be important to ensure effective complaint mechanisms.

The effectiveness of appeals against biased AI-based decisions will depend on judicial interpretation and the work of supervisory authorities in ensuring the availability of training data information. Requiring AI providers to maintain records of training data should not be viewed as burdensome "red tape" but as a critical

¹ Research for this article was partially done with the assistance of artificial intelligence. The statements made in this article are those of the author only and not of the Council of Europe

measure to enhance AI system quality and protect fundamental rights, ultimately benefiting both users and providers.

Keywords: *Artificial intelligence, discrimination / Artificial intelligence, bias, training data / Artificial intelligence, training data, retention / AI Act, remedies, AI Act, high-risk systems / GDPR, remedies / AI Convention, remedies / Venice Commission, AI bias, complaint, effective.*

Introduction

The wide availability of Large Language Models², leads to applications of artificial intelligence (AI) in many sectors. Progressively, more and more decisions by private and public bodies are either based on input provided by AI systems or are made directly by those systems. Eventually, even judicial decisions will be prepared on the basis of AI input. The use of AI for (the preparation of) public and private decision making can be beneficial from the viewpoint of efficiency and cost reduction. However, there is not only a general risk of error in the decisions (or judgments) prepared or taken by AI, but also a specific risk of discrimination and bias³. Artificial intelligence can perpetuate discrimination because of bias, which is inherent in the 'training data', which is used to teach the AI system. This risk and possible means for identification and mitigation of such bias are examined below.

In the absence of effective self-regulation⁴, the risks of Artificial Intelligence have been recognised at the European level, in the European Union and the Council of Europe.

Article 5 of the Artificial Intelligence Act of the European Union (hereinafter 'the AI Act')⁵ prohibits a series of AI applications that can do serious harm, e.g. subliminal manipulative or purposefully deceptive techniques distorting behaviour, untargeted scraping of facial images from the internet or CCTV footage for facial recognition or

² Rohit Patel, Understanding LLMs from Scratch Using Middle School Math, A self-contained, full explanation to inner workings of an LLM, Towards Data Science, 19/10/2024 (<https://towardsdatascience.com/understanding-llms-from-scratch-using-middle-school-math-e602d27ec876>).

³ Frederik Zuiderveen Borgesius, Discrimination, artificial intelligence and algorithmic decision-making, Council of Europe, 2018 (<https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73>).

⁴ Abigail Dubiniecki, Trustworthy AI: String Of AI Fails Show Self-Regulation Doesn't Work (<https://www.forbes.com/sites/abigaidubiniecki/2024/01/25/trustworthy-ai-string-of-ai-fails-show-self-regulation-doesnt-work/>), Melissa Heikkilä, How's AI self-regulation going? One year on from the White House's voluntary commitments on AI, MIT Technology Review, 23/07/2024 (<https://www.technologyreview.com/2024/07/23/1095218/hows-ai-self-regulation-going/>); Gary Drenik, The Pitfalls Of AI Self-Regulation, 22/10/2024 (<https://www.forbes.com/sites/garydrenik/2024/10/22/the-pitfalls-of-ai-self-regulation/>).

⁵ Regulation (EU) 2024/1689 of the European Parliament and the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending certain regulations ('the AI Act').

the use of biometric systems categorising individuals by race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation⁶.

However, a look at the wide range of AI systems, which Article 6 of the EU AI Act identifies as ‘high-risk’, but which are admissible, shows that such systems can thoroughly affect the lives of individuals. We can expect decisions made by AI or with the assistance of AI in areas where discrimination deriving from bias can be a significant danger for individuals affected by those decisions. According to Annex III of the AI Act, high-risk systems include *inter alia* the following fields: biometrics (remote identification systems, biometric categorisation or emotion recognition), education (school admission procedures, evaluation of exam results, detecting prohibited behaviour – cheating – during exams), employment (targeted job advertisements, recruitment, promotion, dismissal), essential public and private services (social benefits and allocations, creditworthiness, risk assessment and pricing for life and health insurance), law enforcement (assessment of risk to be a victim or an offender, evaluation of evidence), migration, asylum and border control (examination of applications for asylum, visa or residence permits), and even the judiciary (researching and interpreting both facts and the law and applying the law to a concrete set of facts – legal subsumption).

AI decision making, even if it is applied in areas below the high-risk threshold can result in erroneous or discriminatory decisions. Apart from questions of copyright⁷, dangers from AI systems stem from errors, either because of incomplete or incoherent data input, or because of so-called hallucinations⁸, when the system provides an answer that sounds reasonable, but that is not based on the applicable facts and legislation.

Even if a final decision is in the end taken by a human on the basis of input from AI, erroneous AI results can sound so convincing and coherent that the human will often confidently follow the recommendations made by the system⁹. Furthermore, in practice, the human in charge of making the final decision (civil servant or judge in the

⁶ On 4 February 2025, the EU Commission published guidelines on prohibited artificial intelligence (AI) practices (<https://digital-strategy.ec.europa.eu/en/library/commission-publishes-guidelines-prohibited-artificial-intelligence-ai-practices-defined-ai-act>).

⁷ Hayden Field, Anthropic will face a class-action lawsuit from US authors, *The Verge*, 17/07/2025 (<https://www.theverge.com/anthropic/709183/anthropic-class-action-lawsuit-pirated-books-authors-downloads>); Jeffrey M. Kelly, Scott N. Sherman, Adrienne Cleven, Matt Gorga, From Copyright Case to AI Data Crisis: How The New York Times v. OpenAI Reshapes Companies’ Data Governance and eDiscovery Strategy, 10/07/2025 (<https://www.nelsonmullins.com/insights/blogs/corporate-governance-insights/all/from-copyright-case-to-ai-data-crisis-how-the-new-york-times-v-openai-reshapes-companies-data-governance-and-ediscovery-strategy>); Ignacio de Gregorio, Why This ChatGPT Court Win is Historic. A Death Sentence to Copyright Laws? 11/11/2024 (<https://medium.com/@ignacio.de.gregorio.noblejas/why-this-chatgpt-court-win-is-historic-997f75927380>).

⁸ Vitaly Kukhareno, Why Do Neural Networks Hallucinate (And What Are Experts Doing About It)? Towards AI, 11/11/2024 (<https://pub.towardsai.net/why-do-neural-networks-hallucinate-and-what-are-experts-doing-about-it-7b9342605bf7>).

⁹ Katie Szilagyi, Regenerating Justice: ChatGPT and the Legal Minefield of Generative AI, 01/10/2024 (<http://dx.doi.org/10.2139/ssrn.4976738>); Krook, Joshua and Schneiders, Eike and Seabrooke, Tina and Leesakul, Natalie and Clos, Jeremie, Large Language Models (LLMs) for Legal Advice: A Scoping Review (<http://dx.doi.org/10.2139/ssrn.4976189>).

public law field) may have to deal with so many individual cases that blindly following the proposals made by the AI system may be the only way to cope with the high workload imposed to achieve cost reductions¹⁰.

Appeals against discriminatory AI based decisions face considerable hurdles. As concerns transparency, there are two parts of the problem: does the individual even know that a decision was taken or prepared by an AI system and, if the person has that knowledge, how did the AI system has come up with the results¹¹?

Transparency is essential; even if only part of the preparation of the decision, for instance research, builds on information provided by an AI system, as part of good practice, this should be signalled to the person subject to the decision, but this is not a right in all cases. Article 50 of the AI Act setting out transparency obligations is not explicit on the right to be informed that a decision affecting a person was made using an AI system. At least for high-risk systems that right can be inferred from Article 86 of the AI Act because the right to an explanation of individual decision-making (see below) requires as a pre-condition that the person concerned knows that a given decision is AI based.

Further, even if the individual subject of the AI based decision is aware of this fact, in an appeal against that decision it may be very difficult for the individual to find evidence that the decision was biased and discriminatory¹².

This challenge of the effectiveness of remedies against the use of AI stems from the fact that typically AI systems are “black boxes”¹³; they are trained on vast amounts of training data and usually the providers of AI systems themselves cannot explain in detail why their system gives a specific answer¹⁴. AI systems make sophisticated

¹⁰ An excessive workload can be a serious problem for judges even in contexts not related to AI, see for instance Venice Commission, CDL-AD(2017)004, Turkey – Opinion on the duties, competences and functioning of the criminal peace judgeships, para. 24.

¹¹ Gabriele Spina Ali / Ronald Yu, Artificial Intelligence between Transparency and Secrecy: From the EC Whitepaper to the AIA and Beyond, European Journal of Law and Technology (<https://www.ejlt.org/index.php/ejlt/article/download/754/1044/3716>); Georgie Gould, Understanding AI decision-making: Research examines model transparency, TechXplore, 19/02/2025 (<https://techxplore.com/news/2025-02-ai-decision-transparency.html>); European Data Protection Supervisor, TechDispatch on Explainable Artificial Intelligence, 16/11/2023 (https://www.edps.europa.eu/data-protection/our-work/publications/techdispatch/2023-11-16-techdispatch-22023-explainable-artificial-intelligence_en).

¹² Ivana Bartoletti / Raphaële Xenidis, Study on the impact of artificial intelligence systems, their potential for promoting equality, including gender equality, and the risks they may cause in relation to non-discrimination, Council of Europe, 2023 (<https://edoc.coe.int/en/artificial-intelligence/11649-study-on-the-impact-of-artificial-intelligence-systems-their-potential-for-promoting-equality-including-gender-equality-and-the-risks-they-may-cause-in-relation-to-non-discrimination.html>).

¹³ Valerie du Preez, et al. From bias to black boxes: understanding and managing the risks of AI – an actuarial perspective, Published online by Cambridge University Press, 11/04/2024 (<https://www.cambridge.org/core/journals/british-actuarial-journal/article/from-bias-to-black-boxes-understanding-and-managing-the-risks-of-ai-an-actuarial-perspective/9F06CF4E8EFB555202B2AA4ED78DD716>).

¹⁴ Researchers from Anthropic looked into the reasoning of the Claude 3.5 Haiku AI system and identified methods of reasoning that are very different from that of humans; they saw how incorrect ‘guessing’ resulted in hallucinations and how the model does calculations by way of approximation while explaining that it had come

statistical operations, which depend on a high number of parameters, which in turn depend on the data, which was used to train the system.

This means that often even the provider of the AI system cannot explain why a certain output was produced in a given context. As a consequence, for an individual subject to an AI based decision it may be very difficult to establish a link between the way that the system was trained and the decision affecting him- or herself.

Because of these risks, the scope of rules of evidence in appeals against decisions, which were taken by an AI system or where AI provided input for a decision taken by a human should be adapted in judicial practice to these challenges and the review of such decisions should allow for additional safeguards, as compared to decisions taken by humans only.

Such additional scrutiny will reduce the efficiency and cost savings achieved through the use of AI, but this is a necessary corollary of partially ‘outsourcing’ decision making power from humans to AI.

In the following, we will identify provisions that are relevant for appeals against decisions taken by or on the basis of AI in EU legislation and Council of Europe texts, before looking into the Venice Commission’s proposal on AI training data retention.

EU legislation

General Data Protection Regulation (GDPR)

Well before the 2024 AI Act, Article 22 of the EU General Data Protection Regulation (GDPR)¹⁵ already provided that the data subject “shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her”. The term ‘automated decision making’ of course applies also to decisions taken by AI.

However, Article 22 (2) GDPR allows exceptions in case of a contract between the data subject and a data controller, authorisation by a law “to which the controller is subject and which also lays down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests” or when it is based on explicit consent. In case of public decisions taken by an AI system, the exception of authorisation by law would probably be applicable. Elements to ensure that such a law also contains ‘suitable measures’ are part of the discussion in this article.

to the results using standard calculation methods; summary: <https://www.anthropic.com/research/tracing-thoughts-language-model>; papers: Jack Lindsey et. al., *On the Biology of a Large Language Model*, 27/03/2025 (<https://transformer-circuits.pub/2025/attribution-graphs/biology.html>); Emmanuel Ameisen et al., *Circuit Tracing: Revealing Computational Graphs in Language Models*, 27/03/2025 (<https://transformer-circuits.pub/2025/attribution-graphs/methods.html>).

¹⁵ Adopted on 14 April 2016, to become effective on 25 May 2018 (https://www.edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en).

In its Opinion on the Legal Protection of Citizens, requested by the Netherlands¹⁶, the Venice Commission discussed the exceptions to Article 22 of the GDPR and concluded that the use of (double) citizenship to identify migrants had not been covered by such an exception¹⁷.

Even if the right not to be subject to automated data processing were excluded under these exceptions, a discriminatory decision taken by an AI system or with the help of an AI system could also violate other rights under the GPDR. These rights include transparency – Article 12, information on data collection and origin – Articles 13 and 14, right of access to data – Article 15, right to rectification – Article 16, right to be forgotten – Article 17, right to a restriction of data processing – Article 18, right to notification – Article 19, right to data portability – Article 20 or the right to object – Article 21. If any of these rights were affected, complaints under the GPDR should be possible.

The GDPR introduces a specific remedy: when a person (data subject) is of the view that his or her rights under the GPDR – Article 22 or another right – have been violated, Article 77 of the GPDR provides for a complaint to a supervisory authority in the EU Member State of the residence, place of work or the place where the infringement occurred. A decision of that authority can in turn be appealed to court (Article 78). A consistency mechanism linking supervisory authorities (Article 63) should ensure that the GDPR is applied coherently among Member States also as concerns appeals¹⁸.

Even without such a prior complaint to a supervisory authority, a person (data subject) has a right to a direct judicial remedy against the data controller or processor.

¹⁶ As a follow-up to that opinion in the field of AI, the Dutch Parliament informed the Commission that it had addressed the use of Artificial Intelligence when making administrative decisions, several new policies and guidelines were being elaborated to ensure that AI technology did not lead to discrimination and respects privacy and other fundamental rights ([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PL-PV\(2022\)003-bil](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PL-PV(2022)003-bil)).

¹⁷ Venice Commission, Netherlands – Opinion on the Legal Protection of Citizens (CDL-AD(2021)031): “95. As concerns EU Law, Article 22 of the GDPR on the conditions for the use of algorithms for making decisions with legal effects is relevant in this case. As a main rule, a (natural or legal) person has the right not to be the subject of a decision based exclusively on automated processing significantly affecting him or her. However, there are three exceptions. Two of them are based on the explicit consent of the person or on the conclusion of a contract that requires the use of an algorithm. The third exception corresponds to cases where applicable EU or that of the Member State authorizes the exclusive use of an algorithm to base the decision in question. In such a case, appropriate measures must be provided for in order to safeguard the rights and freedoms and the legitimate interests of the person affected concerned. Furthermore, no decision adopted with the exclusive use of an algorithm may be based on “sensitive” personal data (data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as genetic, biometric, health data or data relating to life or sexual orientation of somebody).

96. In the Netherlands, the use of nationality as possible criteria for identifying fraud would seem to fall under these prohibitions. Discriminatory practices were systematised through algorithms”.

¹⁸ Detlev Gabel / Tim Hickman, Chapter 16: Remedies and sanctions – Unlocking the EU General Data Protection Regulation, While & Case, 28.05.2025 (<https://www.whitecase.com/insight-our-thinking/chapter-16-remedies-and-sanctions-unlocking-eu-general-data-protection>).

Such proceedings shall be brought in the Member State where the data controller or processor has an establishment or in the Member State where the data subject has a residence, unless the data controller or processor is a public body acting within its powers. Such appeals entitle also to compensation (Article 82).

For the topic of appeals against discriminatory decisions taken by AI or on the basis of AI input, remedies under the GDPR are relevant because in most cases a decision affecting an individual will also involve personal data of that person. Even when the specific right not to be subject to automated data processing of Article 22 GDPR does not apply in a given case, if there is a violation of another right under the GDPR, the individual can have recourse to the specific complaint under Article 77 GDPR or s/he can bring a direct claim to court against the data controller or processor.

Artificial Intelligence Act (AI Act)

In order to address the specific risks of Artificial Intelligence, the European Union adopted the AI Act¹⁹ on 17 June 2024 and it entered into force on 1 August 2024. It will go into effect in stages²⁰. The AI Act creates obligations for providers and deployers of AI systems in the single market. It imposes specific requirements on AI systems (e.g., transparency, technical documentation), which can serve as evidence in court proceedings.

After excluding some AI applications in its Article 5, the Act distinguishes between various levels of risks, notably high-risk systems (criteria listed in Annex III of the Act) and obliges the providers and deployers of AI systems *inter alia* to establish a risk management system with appropriate data governance and record keeping.

Under the AI Act providers of AI systems, both as concerns high-risk systems and general-purpose AI systems, shall keep and provide documentation including on the training data used. This is relevant in the present context of appeals based on the allegation that the data used for the training of the system was biased.

Article 11 of the AI Act provides that for high-risk AI systems a detailed technical documentation has to be drawn up. Annex IV, which lists the elements of information to be contained in that technical documentation, requires that documentation include where relevant, descriptions of “the training methodologies and techniques and the training data sets used, including a general description of these data sets, information about their provenance, scope and main characteristics”. The documentation shall

¹⁹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance).

²⁰ Following the recent publication of the General-Purpose AI Code of Practice, rules on general purpose AI should go into effect on 2 August 2025 (https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1787); there is resistance against this voluntary code (<https://www.euronews.com/next/2025/07/10/eu-waiting-for-companies-to-sign-delayed-ai-code>; Ram Iyer, Meta refuses to sign EU’s AI code of practice, TechCrunch, 18/07/2025 (<https://techcrunch.com/2025/07/18/meta-refuses-to-sign-eus-ai-code-of-practice/>)).