

Artificial Intelligence: Is the European Court of Human Rights Prepared?¹

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It is widely known that artificial intelligence is part of our lives. It is also generally feared that artificial intelligence has a potential to endanger human rights in this digital age. The paper intends to examine whether the European Court of Human Rights, dedicated to protecting human rights in Europe, has been forced to deal with artificial intelligence. The main focus of the analysis is the case law of the Court: after the identification of the human rights potentially in danger, the database of the Court's case law, HUDOC, has been screened by keyword search. Based on the examination of the jurisprudence, the paper will disclose if the Court has artificial intelligence-related cases and attempts to predict whether it ever will.

Keywords: artificial intelligence, European Court of Human Rights, case law, data protection

Introduction and methodology

The Secretary General of the Council of Europe (CoE) claimed related to artificial intelligence (AI) that “[t]he Council of Europe has, on many occasions, demonstrated its ability to pioneer new standards, which have become global benchmarks”³ This paper intends to examine whether the European Court of Human Rights (ECtHR/Court), set up by the CoE member states, also has the ability to do so in this relatively new field.

“AI is already with us” – explains Marija Pejčinović Burić,⁴ and its challenges are unavoidable not only for individuals, but also for international organisations, especially the ones dealing with human rights (HR/HRs). This is not surprising for science; academic journals have already published a plethora of papers on theoretical issues related to AI and HRs. While theory can support and influence practice, it cannot replace it. Thus, for a full picture on the relations

- 1 Project no. TKP2021-NKTA-51 has been implemented with the support provided by the Ministry of Innovation and Technology of Hungary from the National Research, Development and Innovation Fund, financed under the TKP2021-NKTA funding scheme.
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- 3 Council of Europe s. a. a.
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between AI and HRs, the examination of HR protection on the ground is necessary. Still, analysing the practice on such a connection is too big of a mission for one paper, therefore, this work will be limited to the analysis of the case law of the ECtHR related to AI. It is important to note, that detailed analysis of the ECtHR practice on data protection in the digital age⁵ and on mass surveillance⁶ has been done, but of artificial intelligence as a violator or a tool of violation was not.

Despite countless scientific efforts, the very definition of AI is unclear. Thus, it seems necessary to dedicate the first section of the present paper to definitions and introductory explanations.

Second, the relevant practice of the ECtHR shall be explained. The Court regularly prepares and updates thematic guides for HR practitioners about its jurisprudence. Such a summary was prepared on data protection, which includes a collection of judgements under a chapter entitled “[T]echnological advances, algorithms and artificial intelligence”.⁷ The present paper focuses first on this list of AI-related judgements provided by the ECtHR itself. The paper also aims to identify the human rights listed in the European Convention on Human Rights (ECHR),⁸ which can particularly be challenged by AI. To this end, also those human rights will be listed, which were claimed to be violated in these judgements, but the ECtHR did not examine them, or found no violation.

Third, literature reveals that AI is not a HR specific problem but concerns several human rights. Consequently, we cannot be satisfied by describing the judgements identified as relevant by the Court but must go further. In this most practice-oriented part of the paper HRs will be identified where the usage of AI may have resulted in a violation. Literature review will be complemented by analyses of the case law of the ECtHR, based on keyword search of the HUDOC database.

This paper intends to confirm two basic assumptions and answer three questions.

First, based on logic and the relevant literature, two assumptions seem logical: a) Data protection is the core of the problem;⁹ but b) AI may touch upon the majority of human rights included in the Universal Declaration on Human Rights¹⁰ (UDHR).¹¹

Here, a remark must be made: in the literature two human rights are most often mentioned in connection with AI: privacy (data protection) and the prohibition of discrimination. Though both will be analysed in the case law of the Court, even before the detailed examination we dare to claim that the former got more attention from the ECtHR so far. Also, this paper examines the case law of the ECtHR, which covers

5 ÇINAR 2020: 26–51.

6 RUSINOVA 2022: 740–756.

7 ECtHR 2020.

8 CoE: European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

9 As shown by the ECtHR Guide (ECtHR 2020).

10 United Nations General Assembly: Universal Declaration of Human Rights. A/Res/217(III), 10 December 1948.

11 RISSE 2019: 16.

exclusively the human rights incorporated in the ECHR. Naturally therefore, the list of human rights this paper uses is limited, thus the overall picture may be distorted. If one extends the scope of analysis to economic, social and cultural rights, as Nagy did in her work, the emphasis may shift from data protection.¹²

Second, the questions: a) Has the ECtHR dealt with AI-related issues already? b) Will it be forced to deal with these questions? and if so c) Will it be able to handle them properly?

Council of Europe and AI

CoE confirmed numerous times the importance of AI and human rights and tasked itself with working out recommendations to enhance the protection of the latter from the former. It seems that the CoE indeed achieved a lot in this field in a relatively short time. Standards were worked out during the last five years, starting with the recommendation of its Parliamentary Assembly in 2017.¹³ After this report several documents were adopted, both transversal and field specific.¹⁴ One of the most recent developments was a conference held during the Hungarian Presidency of the Committee of Ministers at the end of 2021. Going through these documents provides the reader with a perspective on what kind of guidelines the CoE wants its member states to follow. The documents list risks, principles, checklists. But the monitoring of the impact of these guidelines implemented by the member states of the CoE on human rights is up to the ECtHR.

Talk about AI more often than not implies superintelligence. The CoE itself explains AI as “[a] set of sciences, theories and techniques whose purpose is to reproduce by a machine the cognitive abilities of a human being. Current developments aim, for instance, to be able to entrust a machine with complex tasks previously delegated to a human”.¹⁵ Several other international organisations came up with AI definitions, for example the European Union (EU),¹⁶ or the Organisation for Economic Co-operation and Development (OECD).¹⁷

Science is also working on different definitions. Some argue that such a definition cannot be created, because AI “stands for a confused mix of terms – such as ‘big data’, ‘machine learning’, or ‘deep learning’ – whose common denominator is the use

12 See a more inclusive analysis in NAGY s. a.

13 CoE Parliamentary Assembly 2017. It has to be mentioned that the recommendation itself refers to another relevant document dated back to 2015: CoE Parliamentary Assembly 2015.

14 See the comprehensive list at the CoE website www.coe.int/en/web/artificial-intelligence/work-in-progress#01EN

15 Council of Europe s. a.b. The CoE Commissioner for Human Rights uses another, mainly overlapping, definition: “A set of sciences, theories and techniques dedicated to improving the ability of machines to do things requiring intelligence”(CoE Commissioner for Human Rights 2019: 5).

16 European Parliament: Report on artificial intelligence: questions of interpretation and application of international law in so far as the EU is affected in the areas of civil and military uses and of state authority outside the scope of criminal justice, 2020/ 2013(INI), 4 January 2021, Art. 1.

17 OECD 2019.

of expensive computing power to analyse massive centralised data”.¹⁸ András Hárs concluded by comparing scientific definitions, that AI “operates independently or semi-independently from its maker; possesses knowledge; is able to utilize the latter in a manner not predetermined by its code; and is able to communicate with the outside world”.¹⁹

The problem with all of the definitions, apart from being exceedingly vague, is that their content changes constantly. While we already have categories for autonomous driving capability in cars,²⁰ there are no such categories for AI technologies (at least not widely accepted ones),²¹ which means that for the general public (whose human rights may be violated) both a supercomputer (occasionally) beating the world’s best go player,²² and a vacuum cleaner are AI.²³ While the categories of narrow and general (strong) AI exist, the technological development achieved only the former so far, thus all current technologies using AI in any field considered to be weak AI.²⁴ The real concern is not that the general public does not know, but also AI professionals and human rights practitioners have little idea where “deep learning” ends and superintelligence starts.

The only thing we can know for certain, that “artificial intelligence already *plays a role in deciding* what unemployment benefits someone gets, where a burglary is likely to take place, whether someone is at risk of cancer, or who sees that catchy advertisement for low mortgage rates” (emphasis added).²⁵ The extent of AI usage may influence the extent of the human rights violations, which happen *because of it*. If we accept that there is no superintelligence and AI “plays a role in decisions”, there is one more remark to be made: a HR may be violated by something or somebody using AI as a tool. In this case the Court has a relatively easy job to do: find the violator and make it pay compensation to the victim. The situation becomes (or rather may/will become) more complicated, when decision-making is completely taken over by AI, because the violator is hidden: is it the creator of the AI system or is it the user, or ad absurdum, is it the AI itself?

Case law of the ECtHR related to AI

Looking through the ECHR, Art. 8, the right to respect for private and family life, seems like an obvious human right which can be potentially violated by an AI mechanism.

18 KATZ 2017.

19 HÁRS 2021: 325.

20 Society of Automotive Engineers (SAE) 2021.

21 The OECD prepared a report on the classification of AI, but the aim of this classification is not to distinguish the stages of development in a general sense, but rather the classification of existing AI systems based on a set of criteria (OECD 2022).

22 BBC News 2016.

23 BERRY 2021.

24 LELE 2019: 142.

25 Fundamental Rights Agency 2020: 1.

Especially, if we partly or fully identify AI issues as data protection problems. And looking at the definitions mentioned before, we have a reason to: current AI is a collection of techniques making decisions from *data* provided for them. To confirm the two assumptions, the analysis of the jurisprudence of the ECtHR is necessary. The thematic guide on data protection under the “[T]echnological advances, algorithms and artificial intelligence” chapter mentions 5 key judgements of the ECtHR. All judgements were delivered after 2008, thus it seems that technological advancement started to cause HRs problems since the beginning of the 21st century. These judgements do not explicitly mention AI, but another case does, of which a brief description will be added.

*Case of S. and Marper v. The United Kingdom*²⁶

Amongst the key judgements related to AI, this is the oldest, being delivered in 2008. Two applicants claimed that the retention of their fingerprints, DNA samples and DNA profiles for an indefinite time after the discontinuation of the criminal proceedings against them is a violation of their rights under Art. 8 of the ECHR. The Court held that there has been a violation of Art. 8. What is important from the point of view of this paper is that though AI was not explicitly mentioned, the Court took into consideration the development of technology: “Bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today.”²⁷ The applicants of the case had a powerful argument claiming that the data stored about them was available not only for police bodies, but for government agencies, private groups and even for some certain employers.²⁸ The Court acknowledged that automatic processing, what is a key feature of AI, require more than normal safeguarding measures.²⁹

In this case the applicants complained not only under Art. 8, but also under Art. 14, but the Court did not find it necessary to examine the latter.

*Case of Szabó and Vissy v. Hungary*³⁰

The two applicants complained under Arts. 8, 13, and 6 of the ECHR against the Hungarian Government arguing that one form of surveillance allowed by law is “unjustified and disproportionately intrusive.”³¹ Without mentioning AI, the Court

26 *S. and Marper v. The United Kingdom* nos 30562/04 and 30566/04.

27 *S. and Marper v. The United Kingdom*. 71.

28 *S. and Marper v. The United Kingdom*. 87.

29 *S. and Marper v. The United Kingdom*. 103.

30 *Szabó and Vissy v. Hungary* no. 37138/14.

31 *Szabó and Vissy v. Hungary*. 3.

took into consideration some technological factors in its decision: “Automated and systematic data collection is technically possible and becomes widespread.”³² A third party, Center for Democracy and Technology refers to AI-based techniques even more concretely: “Sophisticated analysis of the intercepted data.”³³ The main argument of the Court was that there were not enough guarantees built into the Hungarian legal system, therefore, the violation was unanimously decided.

The Court however did not establish the breach of Art. 13 and decided that there was no need to examine the violation of Art. 6.

*Case of Roman Zakharov v. Russia*³⁴

The case has been decided by the Grand Chamber of the ECtHR in 2015 and is a widely cited judgement, because of its importance. The applicant claimed that “the system of secret interception of mobile-telephone communications in Russia violated his right to respect for his private life and correspondence.”³⁵ The Court found that indeed there has been a breach of Art. 8 for several reasons, including the lack of effective remedy.³⁶ Like in other key judgements, AI was not mentioned, but technological advancement was taken into consideration as an important fact: It is “essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated.”³⁷

Besides Art. 8, the applicant claimed the violation of Art. 13 as well, where the Court decided that it requires no separate examination.³⁸

*Case of Breyer v. Germany*³⁹

The main question of the case was best summarised by Judge Ranzoli in his dissenting opinion: “What are the requirements under art. 8 – in particular concerning safeguards – with regard to storage of personal data which are qualified as being of limited weight but may easily be retrieved in huge amounts by a broad range of authorities?”⁴⁰ The applicants claimed that the German Telecommunications Act violated their rights under the ECHR, namely under Arts. 8 and 10 by making registration for pre-paid SIM cards obligatory. The ECtHR found that Art. 8 was not violated, because the restriction of its enjoyment was in accordance with the law,⁴¹

32 *Szabó and Vissy v. Hungary*. 68.

33 *Szabó and Vissy v. Hungary*. 49.

34 *Roman Zakharov v. Russia* no 47143/06

35 *Roman Zakharov v. Russia*. 3.

36 *Roman Zakharov v. Russia*. 302.

37 *Roman Zakharov v. Russia*. 229.

38 *Roman Zakharov v. Russia*. 307.

39 *Breyer v. Germany* no 50001/12.

40 *Breyer v. Germany*. Dissenting opinion of Judge Ranzoli. 2.

41 *Breyer v. Germany*. 83–85.

served a legitimate aim,⁴² and answered to a pressing social need in a proportionate manner.⁴³

Only if AI can be identified as a set of huge data, then indeed, the case concerns AI. But in this particular case no decision was made by AI, it simply was able to handle a big database, which can be done by a simple personal computer, with a basic software, there is no need for machine learning in this case. This judgement is listed among the key decision of the ECtHR, because the Guide is not limited to AI-related cases but deals with technological advances as well.

Besides Art. 8, the violation of Art. 10 was also claimed by the applicants. However, the Court decided that the latter would not be considered.⁴⁴

Case of Gaughran v. The United Kingdom⁴⁵

In this case the ECtHR established the violation of Art. 8 of the ECHR, because the DNA profile, fingerprints and photographs of persons, who were convicted for an offence punishable by imprisonment, could be retained for an indefinite time. The Court did not only focus on the unlimited time of the retention, but the lack of review in the system.⁴⁶ What makes this case interesting from an AI point of view is that in this judgement the Court recognised that the development of technology can be a decisive factor for the ECtHR in deciding if there has been a violation of the ECHR. Contrary to the Court's assessment in the *S. and Marper* case the storage of the photographs was considered an interference with the applicant's right under Art. 8, because the photos could be uploaded to a database, in which facial mapping and facial recognition software were available.⁴⁷ The ECtHR did not mention artificial intelligence though, and from the judgement it is not clear that the database referred to (Police National Database) was a simple database with search functions or a software capable of learning, equipped with AI.

Plus one: The case of Sigurdur Einarsson and Others v. Iceland⁴⁸

This is the only case, according to the HUDOC database, where the expression "artificial intelligence" was mentioned, but the guide on the case law does not mention it.⁴⁹ The applicants claimed that their rights under Arts. 6 and 8 were violated.⁵⁰ As for the latter, the Court rejected the complaints for being manifestly

42 *Breyer v. Germany*. 86.

43 *Breyer v. Germany*. 90 and 95.

44 *Breyer v. Germany*. 62.

45 *Gaughran v. The United Kingdom* no 45245/15.

46 *Gaughran v. The United Kingdom*. 96.

47 *Gaughran v. The United Kingdom*. 68–70.

48 *Sigurdur Einarsson and Others v. Iceland* no 39757/15.

49 But another Guide does mention it as a key judgement (ECtHR 2022b: 183).

50 *Sigurdur Einarsson and Others v. Iceland*. 3.

ill-founded,⁵¹ and in other cases, for non-exhaustion of domestic remedies.⁵² AI was mentioned related to Art. 6, para. 1 and 3(b). According to the applicants, they did not have access to the full documentation of their case, only part of it, which was created by a software (Clearwell). Though the Court did not find the breach of the ECHR, Judge Pavli published a partly dissenting opinion, which concerns this issue. According to him, the ECtHR in this case “misses an opportunity to weigh in on the complicated questions at the intersection of new technologies and high-volume evidentiary issues.”⁵³ He drew attention to the fact that technological advancement may challenge generally used principles, in this case the equality of arms.⁵⁴ Based on several argument, he concluded that Art. 6, para. 1 of the ECHR has been violated.

Summary

Looking at the judgements, a few basic remarks should be made:

- None of the judgments, which were considered “key” from a technological advancement and AI point of view mentioned AI explicitly. All judgements mentioned technological advancement not as a problem or a danger, but as something to be taken into consideration in creating safeguards for the better protection of private life.
- Art. 8 was the only article of the ECHR, where violation has been established. The other 4 claimed to be violated were Arts. 6, 10, 13, and 14, but only one of them, Art. 6. was examined closely by the Court. However, we have to keep in mind that according to the Court, these judgements should be interpreted together with the ones “on storage of personal data for the purposes of combating crime and data collection by the authorities via covert surveillance”⁵⁵ and the latter cases concern other articles of the ECHR. It thus seems to confirm the assumption, that AI related cases are somehow centred around Art. 8. We still must remember that Art. 8 is a very complex right, which covers several facets of private life: it “protects, inter alia, the right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.”⁵⁶

Our first assumption was confirmed by the judgements above: the core of the AI problem *so far in the jurisprudence of the ECtHR* is data protection. However, the case of *Case of Sigurdur Einarsson and Others v. Iceland* judgement showed that the second assumption seems confirmed too: more than one human right may be endangered,

51 *Sigurdur Einarsson and Others v. Iceland*. 122.

52 *Sigurdur Einarsson and Others v. Iceland*. 124.

53 *Sigurdur Einarsson and Others v. Iceland*. Partly Dissenting Opinion of Judge Pavli. 4.

54 *Sigurdur Einarsson and Others v. Iceland*. 10.

55 ECtHR (2020): op. cit. fn. 16.

56 *Breyer v. Germany*. 33.

or rather touched upon by AI. Thus, it is worth examining the jurisprudence of the ECtHR even further.

Jurisprudence of the ECtHR related to other relevant human rights

Our first task in analysing jurisprudence is to identify the rights which may be relevant. The European Union Agency for Fundamental Rights (FRA) prepared a report in 2020, which identified several risks posed by AI on human rights.⁵⁷ This report was used as a starting point and was complemented by other works for clarity. After, the identification of the rights in question, the HUDOC database was used in search for the relevant judgements. The keywords used were difficult to determine, in lack of a generally accepted definition of AI. As shown in the previous unit, the ECtHR hardly uses the expression. Learning from the vocabulary used by the judgements, and the literature on the definition, the following keywords were used in the search: “software” and “algorithm”.⁵⁸ These were complemented by right-specific keywords.

According to the FRA Report, the human rights, which are particularly vulnerable (already at the moment) to AI are: human dignity, right to privacy and data protection, which is a prerequisite for the enjoyment of freedom of expression, freedom of religion and freedom of assembly; and the right to non-discrimination. The following units are focused on both the literature on the potential connection of these rights and AI, and then they intend to find relevant cases of the Court, if any.

Right to life and prohibition of torture – Arts. 2 and 3

Public international law did not start to deal with AI in general but was and still is focusing on certain questions related to the development of this new technology.⁵⁹ One of the first questions, which interested international law related to AI was the use of autonomous weapon systems. These systems are defined in various ways,⁶⁰ but all definitions agree that they are able to kill.⁶¹ This naturally means

57 Fundamental Rights Agency 2020: Chapter IV. We should mention that FRA used the Charter as a reference point in the identification of the human rights at risk, while our point of reference is the ECHR.

58 Artificial intelligence was used as a search filter beforehand, thus it was not used in the further analyses of the HUDOC. “Software” was relevant in the only judgement, where the Court used the expression of AI. “Algorithm” seems to be a common determinant in AI definitions, though it is missing from the definition created by the CoE (ASHRAF 2022: 758).

59 In fact, Burri scolded international lawyers for not analysing AI in its complexity (BURRI 2017: 92).

60 The International Committee of the Red Cross (ICRC) defines them as “weapons that can independently select and attack targets, i.e. with autonomy in the ‘critical functions’ of acquiring, tracking, selecting and attacking targets (International Committee of the Red Cross [ICRC] 2014: 7).

61 The lack of definition of AI causes a significant problem here. We can only assume that drones, which are controlled by humans are not equipped with AI, while autonomous weapon systems are, since the latter is able to identify a target and kill without human intervention (LAUFER 2017: 68). This is also supported by the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, where it confirms that strong AI is not in the picture in the

that they can in fact violate the right to life. Some argue that human dignity is also endangered by the use of these systems since it is “an affront to an individual’s dignity if the decision to kill them is made by a machine that does not recognise the value of their life.”⁶² Translating the problem to ECHR language: Art. 2, the right to life and Art. 3, prohibition of torture may be endangered by this form of AI.⁶³ It is important to note, that at the moment, these “killer robots” do not exist, but are under development.⁶⁴ Still, it would be wise to see the Court’s assessment on drones and similar technologies.⁶⁵

For the search in the jurisprudence the keyword “drone” was added, and the cases were selected out manually based on their significance.⁶⁶

There are three judgements of the ECtHR, which are dealing with the usage of drones. In the Case of *Hanan v. Germany*,⁶⁷ where the applicant claimed, “that the respondent State had not conducted an effective investigation, as required by the procedural limb of Article 2 of the Convention, into an air strike of 4 September 2009 near Kunduz, Afghanistan, that had killed, inter alios, the applicant’s two sons.”⁶⁸ The airstrike was performed by manned aircrafts, not by AI equipped machines. The applicant, however, claimed that drones (un-manned aircrafts) should have been used for effective investigation.⁶⁹

In the Case of *Georgia v. Russia (III)* drones were only mentioned as tools in the killings and no AI use is detectable from the circumstances of the case.⁷⁰ Lastly, a case under deliberation mentioned the usage of drones as tools for surveillance and claimed the violation of Art. 3 of the ECHR.⁷¹

Freedom of expression and freedom of thought, conscience, and religion – Arts. 10 and 9

AI has been used to find peoples’ preferences for long. But recently, social media platform providers found a new application field: removal of information, which breaches their terms of services. Google provides a wide range of data on this

near future but does confirm weak AI presence in these systems being developed (Human Rights Council 2013: paras. 39 and 43).

62 SHARKEY 2019: 78.

63 LAUFER 2017: 63. See also Amnesty International 2015: 5.

64 HYNEK–SOLOVYEVA 2021: 79.

65 Amnesty International 2015: 5.

66 We must emphasise that this paper cannot cover all aspects of autonomous weapon systems and the right to life. The sole aim of it is to discover if the ECtHR has ever had the chance to examine the question itself in connection with AI.

67 *Hanan v. Germany* no 4871/16.

68 *Hanan v. Germany*. 3.

69 *Hanan v. Germany*. 164.

70 *Georgia v. Russia (III)* no 38263/08.

71 ECtHR 2018.

process.⁷² Here, we will only draw attention to one fact with huge relevance: at the first 3 months of 2022, 99.3% of removed channels were flagged automatically by an AI system and only the rest of the channels were reported by people. There are several technologies using AI developed to limit hate speech, abusive content, and to detect anything which could harm children.⁷³

The enjoyment of the freedom of expression can be restricted by States. However, based on the ECHR and the jurisprudence of the ECtHR, the restrictions must fulfil certain requirements: each shall be lawful, pursue a legitimate aim and be necessary in a democratic society.⁷⁴ When an AI system flags and deletes a comment it considers harmful based on the terms of service of a platform, it restricts beyond doubt the enjoyment of the freedom of expression. And yes, they might be wrong, unnecessarily limiting this right.⁷⁵

Comments can be deleted for several reasons, one of them is because they are considered hate speech. While there is a common understanding among States that freedom of speech shall be protected, the extent and practice of this protection varies. It seems that the international community also agrees that hate speech does not deserve the full extent of this protection. But again, there is a disagreement in the definition of hate speech and its place in public discourse.⁷⁶ From an AI perspective, the detection and regulation⁷⁷ of hate speech, even though it is defined in the actual State, are the challenges. Namely, when “hate speech” is found, how it should be tackled, who is responsible for the deletion and what are the remedies, if a mistake is made in the identification. This problem, supposedly, is reflected in the jurisprudence of the ECtHR.

For the search in the database, “internet” has been added as a keyword considering all social media platforms are available online.⁷⁸

The ECtHR had to deal with some cases, where the government closed down websites.⁷⁹ But in these cases we do not know, how the government identified the website to be shut down, it may have been with the help of AI, but we have no information, thus these cases are not analysed.

Out of the 236 cases, which were closed with a judgement of the ECtHR, not even one dealt with AI in any form, at least based on a word search and a thorough analysis of the circumstances of the case. Thus, the ECtHR focused more on the decision of the authorities on how to handle the detected information, supposedly

72 Google s. a.

73 OLIVA 2020: 623–629.

74 ECHR, Art. 19, para. 2.

75 HELLER 2018.

76 O'REGAN 2018: 408.

77 YAR 2018: 6.

78 ECtHR: HUDOC search (<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%7B%22algorithm%20OR%20software%20OR%20internet%22%7D%22%22languageisocode%22:%7B%22ENG%22%7D%22%22article%22:%7B%2210%22%7D%7D>).

79 For example *Ahmet Yildirim v. Turkey* no 3111/10; *Cengiz And Others v. Turkey* nos 48226/10 and 14027/11.

“harmful” and not on the tool of the detection. It seems that in no cases of the ECtHR the deletion or shutting down websites was based on the decision of an AI system, but of the authorities.

As for Art. 9, altogether 11 judgements were found, none of them relevant from an AI point of view.

Prohibition of discrimination

The ECHR prohibits discrimination in two articles, in Art. 14 and in Art. 1 of Protocol No. 12. The former “merely complements the other substantive provisions of the Convention and the Protocols”,⁸⁰ thus “does not prohibit discrimination as such, but only discrimination in the enjoyment of the ‘rights and freedoms set forth in the Convention’”⁸¹ and “has no independent existence”⁸² The latter introduces a general prohibition of discrimination, as a “free-standing right”.⁸³ Plethora of papers were written on the danger automated decisions may pose to human rights, in particular the chance that an automated decision is resulted in discrimination. The fields of concern include hiring processes, prediction of criminal activities,⁸⁴ access to services such as health care.⁸⁵

Not only scientific literature is concerned about the potential for discrimination by automated decision-making processes,⁸⁶ but society in general feels threatened by it.⁸⁷ Therefore, the expectation of the author was to find a lot of cases to analyse. In the database search both articles were used as filters and no complementary keywords were added to find the biggest possible pool to analyse.⁸⁸ Despite the expectations only two cases were found in the database responding to the filters used,⁸⁹ none of them concerning AI. Does it mean that the prohibition of discrimination is not in danger, despite the obvious worry of scientists? Definitely not. Literature mentions a lot of systems, which have an inherent bias in them.⁹⁰ They do exist. Therefore, the lack of ECtHR judgments must only mean that the concerns, violations so far have not reached the ECtHR. Probably, yet.

80 ECtHR 2022a.

81 ECtHR 2022a.

82 ECtHR 2022a. “However, the ancillary nature of Article 14 in no way means that the applicability of Article 14 is dependent on the existence of a violation of the substantive provision.”

83 ECtHR 2022a: 9.

84 ALLEN–MASTERS 2020: 585–598.

85 HOFFMAN–PODGURSKI 2020.

86 ZUIDERVEEN BORGESIUUS 2020: 1574–1576.

87 MEINSCHÄFER–KIESLICH 2020; Information Commissioner’s Office 2019.

88 ECtHR: HUDOC search ([https://hudoc.echr.coe.int/eng#{%22languageisocode%22:%22ENG%22,%22article%22:%2214%22,%22P12-1%22,%22documentcollectionid%22:%22JUDGMENTS%22}}\).](https://hudoc.echr.coe.int/eng#{%22languageisocode%22:%22ENG%22,%22article%22:%2214%22,%22P12-1%22,%22documentcollectionid%22:%22JUDGMENTS%22}})

89 *Coëne and Others v. Belgium* nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96. *Stoian v. Romania* no 289/14.

90 ALLEN–MASTERS 2020: 587–590.

Summary

Based on the search and analysis of the results one conclusion seems well grounded: the ECtHR did not up until now have a case, which is closely related to AI, even though AI may touch upon several human rights apart from Art. 8. At this point it is necessary to revisit the definition of AI for a second. As mentioned before “artificial intelligence already *plays a role in deciding* what unemployment benefits someone gets, where a burglary is likely to take place, whether someone is at risk of cancer, or who sees that catchy advertisement for low mortgage rates” (emphasis added).⁹¹ Based on the examined case law, we found no judgement which even hinted that AI was a violator of any human right without human intervention. Decisions were not made by AI, but agents of a state. In all cases the violator was identifiable, AI was not mentioned to be an autonomous decision-maker. And if so, AI is not a violator, but a tool of the violation without any form of responsibility.

Should and is the ECtHR be prepared?

Though according to scientists, HR practitioners, NGOs, intergovernmental organisations and agencies, several human rights are endangered by AI, we found very little reference to the problem in the case law of the ECtHR. Does it mean that the ECtHR will have little to do with AI-related problems in the future, or should it be prepared to deal with the issue sooner or later? The latter seems the obvious answer for several reasons.

First, it seems unquestionable that the development of AI, taking over several spheres of our lives, is unstoppable. In addition to the organic development of AI, nowadays there are factors influencing international relations that are pushing AI on our everyday life. It is enough to mention the Covid-19 pandemic, when “online” became the norm and “in person” the exception. Or we could mention the war in Ukraine, where both participants discovered AI as a potential advantage in the course of the war.⁹² International organisations seem to take these tendencies into consideration, when preparing for the future with AI.

Second, not only recommendations are worked out, but legally binding documents. For example, the European Commission proposed a regulation in 2021 on AI,⁹³ which after entry into force will be obligatory for all member states of the European Union, also members of the CoE and under the jurisdiction of the ECtHR. Critical voices warn that the Act in its present form may pose more risks than the number of problems it solves. “The Draft AI Act’s poor drafting risks an extraordinarily broad scope, with the supremacy of European law restricting legitimate national attempts

91 Fundamental Rights Agency 2020: 1.

92 PARESH-DASTIN 2022.

93 European Commission 2021.

to manage the social impacts of AI systems' uses in the name of free trade. The Draft AI Act may disapply existing national digital fundamental rights protection."⁹⁴ If so, natural and legal persons under the jurisdiction of the EU member states will be able to turn to the ECtHR, since the compliance with EU law is not a valid excuse for violations of human rights.

Third, there are several States under the jurisdiction of the ECtHR, which started to legally prepare for the AI age. As an example, more and more legislative acts are adopted (on the State's own initiative) on facial recognition, massive surveillance and privacy.⁹⁵ Also technology is slowly but surely taking public administration⁹⁶ and adjudication⁹⁷ over worldwide. Probably, this will result in challenges from a HR perspective.

Finally, national judges have more and more AI-related cases to decide. Surely, most of the cases analysed online were decided in the US.⁹⁸ Still, we find decisions related to AI in the member states of the CoE, under the jurisdiction of the ECtHR.⁹⁹

Consequently, it does not seem possible for the ECtHR to avoid AI-related cases for long. But surely, as it seems, AI will remain a tool of HR violation, not a perpetrator itself. Not until we give control over to it by allowing decisions to be made without human intervention.

Is the ECtHR ready? Only time will tell, but based on the arguments above, it should be. But can we trust that the Court will be able to do a good job in dealing with AI in its case law? So far, the ECtHR has a proven record on handling new phenomena, for example including the right to a healthy environment in the scope of the ECHR;¹⁰⁰ or working out an approach stating that domestic violence can constitute the violation of Art. 3.¹⁰¹

Surely, the above-mentioned wins of the ECtHR required flexibility and profound legal knowledge, and in several cases, for example environment-related cases, specific technical knowledge. But in the case of AI, can the judges acquire such technical knowledge? When even the experts of AI are not sure how to define, categorise, and how to regulate AI?

94 VEALE – ZUIDERVEEN BORGESIUŠ 2021: 111–112.

95 RUSINOVA 2022: 740–756. For an interesting comparison, such legislative acts are being considered in the United States of America as well in huge numbers (National Conference of State Legislatures 2022).

96 AGARWAL 2018: 917–921.

97 THEMELI–PHILIPSEN 2021: 213–232.

98 American Bar Association 2021; Ethical Tech Initiative s. a.

99 VALLANCE 2022; Two cases from the U.K. were taken into consideration by a judgement of the ECtHR as well in the party dissenting opinion of Judge Pavli in the *Sigurdur Einarsson and Others v. Iceland* case, 15 (Library of Congress 2020).

100 ECtHR 2022c.

101 MCQUIGG 2021: 155–167.

Conclusion

The initial goal of the paper has been fulfilled: the case law of the ECtHR is analysed. However, a few remarks must be made to protect the findings of this examination. Admittedly, the scope of the present analysis has been very restricted initially, but during the research process several limitations surfaced. One of the most important ones is that since the ECtHR examines the violation of the rights included in the ECHR, the analysis may be distorted in a sense that some human rights relevant from an AI point of view are ignored in this paper, e.g. the right to health, while social rights do have relevance in AI-related issues.¹⁰² The other factor to consider is that the starting point of the paper was the collection of judgements considered of great importance (“key”) by the ECtHR. It may have resulted in a pre-determined mindset, namely that much emphasis was put on data protection, though confirmed by the case law. Even if the research findings are too limited even to represent fully a small part of a big picture, they are valid and they may serve as a jumping stone for further research.

We conclude this paper with brief answers to our research questions. First, there are hardly any cases in the jurisprudence of the ECtHR dealing with a HR violation directly caused by an AI system, in fact, AI is mentioned only in one judgement of the approximately 25,000. Thus, no, the procedure of the ECtHR has almost never be triggered because of AI.

Second, yes, it seems inevitable that the ECtHR soon faces AI in its practice. However, the when, and the how are unpredictable. Presumably, AI will remain a tool for violation, instead of being an autonomous violator for a long time, as science does not expect superintelligence to appear for a very long time.

Third, will the ECtHR be able to deal with these problems? In the author’s personal opinion: definitely yes. Because it will have to.

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102 NIKLAS–DENCİK 2021: 1–29.

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