THE US-ISRAEL LEGAL REVIEW 2023

Israel's Economy: Turbulence and Hope in Dark Times

A GLOBAL LEGAL MEDIA & NISHLIS LEGAL MARKETING PUBLICATION

GLOBAL LEGAL MEDIA
STRATEGIC LAW FIRM MARKETING

NISHLIS LEGAL MARKETING SETTING THE BENCHMARK

IN ASSOCIATION WITH:
ACC Association of Corporate Counsel ISRAEL

Fox Rothschild

The State of the AI Union: A Conversation

A data protection expert and their apprentice discuss artificial intelligence regulation in the United States[1]

[1] *The format of this article is inspired by the apprentice/philosopher conversation in the excellent book "The Courage to be Disliked" by Ichiro Kishimi and Fumitake Koga.*

A young apprentice in the field of data protection sends a direct message to a data protection expert. This is their conversation:

Apprentice: Artificial intelligence is a highly specialized area. It is so specialized that the tools we have can never be used to regulate it. We obviously need a specialized law for this.

Expert: Must is a strong word. What makes you say that this is the case?

Apprentice: First, AI is a completely new technology and all new technologies need their own legal regime. This has been the case in other instances in history.

Expert: Let's see. All new technologies need their own dedicated regulation. There is a famous discussion about this in the article "Cyberspace and the Law of the Horse" by Frank Easterbrook[2]. It says: "Beliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace. The blind are not good trailblazers." Should lawyers, then, be trusted in prescribing legal adaptations for AI?

[2] *https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2147&context=journal_articles*

There is precedent, even in the EU, for the approach of using existing laws to regulate AI. This appears to be the approach in the U.S. as well.

Apprentice: But what better evidence is there that this is the right path to regulating AI than the fact that the European Union, which is a known leader in innovative regulation, has decided, after a long deliberation, that a dedicated law, the AI Act, is the way to go.

Expert: The European Union certainly deserves credit for the General Data Protection Regulation (GDPR), which was certainly an innovative law when it came out and has definitely set its mark on data protection enforcement both in the EU and throughout the world. Many other laws have been modeled after it (like many U.S. State privacy laws, the new Quebec data protection law, the Brazil LGPD, and several other such laws in South America and Africa). But just because they got GDPR right (and not everyone agrees they did), that does not prove that their approach to AI regulation is the right one. What makes you feel so strongly that this is the right approach?

In the article we just discussed about the "Law of the Horse," Easterbrook continues by saying, "the best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with priz-

ODIA KAGAN
PARTNER, FOX ROTHSCHILD

es at horse shows. Any effort to collect these strands into a course on "The Law of the Horse" is doomed to be shallow and to miss unifying principles."

Apprentice: OK. I agree that using horses as work animals and forms of transportation changed lives in the olden days, but can you really compare this to how AI has burst onto the scene without prior warning?

Expert: Do you think that is what happened with artificial intelligence? Did it really just "burst onto the scene?" What would you say is artificial intelligence?

Apprentice: Well, I understand many are having a hard time agreeing on a definition. The OECD defines an Artificial Intelligence System[3] as a "machine-based system that can, for a given set of human defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments."

Expert: Look at that definition. What about an excel spreadsheet? If you put in a formula that would be computed, wouldn't it fall under this definition? What about recommendation of movies when you watch a streaming service like "People who watched this movie also watched this movie?" What about shopping recommendations on an e-commerce website? What about a chat bot denying entry to a website if you reply that you are under 18?

Apprentice: I suppose that if you look at it that way, it could really encompass some things that have already been happening for a number of years.

Expert: What about algorithms?

Apprentice: What about them?

Expert: There is the age-old discussion about a service provider (also known in data protection circles as a "data processor") that has a SaaS service or a mobile application and wants to use the personal data collected in the provision of the service or the app to "improve the service." Is the use of the data for the improvement of the service considered AI?

Apprentice: No, that's machine learning.

Expert: What is machine learning?

Apprentice: Well, per the Oxford dictionary, machine learning is "the use and development of computer systems that are able to learn and adapt without following explicit instructions, by using algorithms and statistical models to analyze and draw inferences from patterns in data."

Expert: Do you think that's related to artificial intelligence?

Apprentice: Well, it seems it is machine based and makes recommendations and predictions so I would say that it is a subset of artificial intelligence.

Expert: It seems that both IBM[4] and MIT[5] in their definitions of machine-learning agree with you. Has

[3] *https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449*

[4] *https://www.ibm.com/topics/machine-learning*

[5] *https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained*

machine learning been around for a while?

Apprentice: Well, it seems that machine learning powered the checkers game on an IBM 7094 computer that won against checkers expert Robert Nealey, and that was in 1962. So, yes, I would say machine learning has been around for a while.

Expert: What about "profiling and automated decision making?"

Apprentice: Profiling "means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements." Under GDPR, a person has 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."

Expert: We will come to this later, but this is under GDPR you say?

Apprentice: Yes. So I guess that means that this too has been around for at least seven years. Since the final GDPR version was published, and before that too.

Expert: So you are telling me that at that time, the EU did not set out to have a law of automated decision making, just a law of data protection that happens to regulate automated processing where the thing being processed is data?

Apprentice: I see what you did there. Yes, under the EU regime, if automated processing / decision making, which we nowadays call "AI," involves the processing of personal data, which is information that identifies people, then GDPR would apply in addition to the new AI Act. But the AI Act will apply to more than just AI that touches personal data. It will apply to using AI when this could result in "high risk" and imposes various requirements like labelling, risk assessments etc. on the developers (the ones that create the AI) and deployers (the ones that use the system).

Even when using AI, you are still responsible for making sure that the data you use for your processing was obtained with the necessary notices and consents.

Expert: So we see that there is precedent, even in the EU, for the approach of using existing laws to regulate AI. This appears to be the approach in the U.S. as well. Let's call it "Have laws, will regulate."

Apprentice: That reminds me of a sign in a picket line, but what does it mean?

Expert: It means that if something is already illegal under the existing laws, privacy laws, labor laws, copyright laws, election laws and so forth, it will also be illegal if you do the illegal thing using AI.

Apprentice: Can you give me some examples?

Expert: (chuckles) So, first in this imaginary picket line of yours is a representative of the Federal Trade Commission (FTC), the de facto privacy regulator. They have stated that they will enforce uses of AI that constitute "unfair or deceptive acts or practices." This is the FTC's authority under Section 5 of the FTC Act, which it has been using for a while now to regulate data protection in the U.S. in the absence of a federal data protection law. So in this case, if you use AI and make claims about how effective it is, or how accurate it is, or the things that it is able to do – you had better make sure that these claims are accurate and substantiated. If not, that could be deceptive.

Apprentice: So you can't make up claims. Got it. What else?

Expert: You can't omit claims either. The FTC has said that not disclosing all material information to consumers about how you're using and sharing information is also misleading and could also be unfair.

Apprentice: Ok this is getting more complicated. Don't exaggerate, don't mislead by omission. Anything else?

Expert: You are also responsible for making sure that the data you use for your processing was obtained with the necessary notices and consents. That was made clear in the recent FTC decisions on X-Mode[6] and Inmarket[7] that discussed location and other sensitive data.

Apprentice: Interesting…that seems to be a lot like what is required under GDPR to attain your "fair and lawful" status for your processing. But that seems like a tall order for applications that train AI. Don't they hoover up a lot of information from everywhere?

Expert: Yes, and this is the issue. The FTC is currently investigating OpenAI regarding this very issue. In the recent Rite Aid enforcement[8] on smart (biometric) CCTV, the FTC has said[9] very clearly that it is "not afraid of requiring disgorgement of data that it determines to have been ill-gotten, including deleting algorithms or other products that were developed using those images and photos." It has already ordered such remedies in the Kurbo[10] and Ring[11] cases.

Apprentice: So let's say you are using a third-party AI service and you are not collecting the data yourself, how do you know if consent was gotten? Can you just stick it somewhere in the terms of use?

Expert: No. The FTC has said that if consent is needed (which isn't always the case), you need to make sure that whomever is collecting and giving it to you has gotten the right consent. Getting them to say that they "will comply with the law" in your contract with them is not enough. You have to actively check.

Just like under GDPR, profiling and automated decision making is regulated under most, if not all, of the new U.S. state privacy laws.

Apprentice: So the FTC is really serious about its "picket sign," but you mentioned that there are other participants in my imaginary picket line.

Expert: Yes. Along with the FTC, the U.S. Department of Justice (which brings litigation on behalf of the U.S. government), the Consumer Financial Protection Bureau (CFPB), which is a regulator of financial institutions, and the Equal Employment Opportunity Commission (EEOC) issued a joint statement[12] saying that they are ready to enforce AI under the respective laws under their mandate. For example, the EEOC, who is in charge of enforcing against discrimination in employment, has already entered into a settlement with a company for discrimination that was carried out using AI tools and has issued guidance on this topic.[13] The CFPB has also already provided guidance on the use of chatbots[14] and on making credit decisions based on complex algorithms.[15]

---

[6] *https://www.ftc.gov/system/files/ftc_gov/pdf/X-Mode-D%26O.pdf*

[7] *https://www.ftc.gov/system/files/ftc_gov/pdf/D%26O-InMarketMediaLLC.pdf*

[8] *https://www.ftc.gov/system/files/ftc_gov/pdf/2023190_riteaid_stipulated_order_filed.pdf*

[9] *https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without*

[10] *https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-takes-action-against-company-formerly-known-weight-watchers-illegally-collecting-kids-sensitive*

[11] *https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-says-ring-employees-illegally-surveilled-customers-failed-stop-hackers-taking-control-users*

[12] *https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf*

[13] *https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence*

[14] *https://www.consumerfinance.gov/data-research/research-reports/chatbots-in-consumer-finance/chatbots-in-consumer-finance/*

[15] *https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/*

Apprentice: And what about "profiling and automated decision making?" You mentioned we would come back to that. Did it make it into our virtual picket line?

Expert: Certainly. And thank you for reminding me. Just like under GDPR, profiling and automated decision making is regulated under most, if not all, of the new U.S. state privacy laws. Under the Colorado Privacy Act, for example, if you engage in profiling with legal or similarly significant consequences, you need to provide the right to opt-out of the processing and you need to conduct a data protection risk assessment, which is called a DPIA under GDPR. The California Privacy Protection Agency (CPPA) is currently considering regulations under the California Consumer Privacy Act (CCPA) to specifically address automated decision making.

Apprentice: So, basically, in the U.S., if there is already a law that regulates certain conduct, if you engage in this conduct using AI, you can be enforced against under the existing laws. Sounds really simple. Maybe we really don't need any AI specific laws after all?

Expert: If it seems too good to be true, then it usually is. In parallel with enforcing the existing laws, the U.S. has started on a path of laws that will specifically regulate certain aspects of AI.

Apprentice: Uh-oh. Like what?

Expert: Well, one such family of laws are meant to regulate how the government and government entities use AI. To this end, we have now seen both the White House's Blueprint for an AI Bill of Rights and the White House's Executive Order on AI.[16] Since then, things have been happening quickly, and the agencies are hard at work. For example, the OMB has recently published its rules[17] and they have a lot of similarities with the EU AI Act. They are divided into "rights impacting use" and "safety impacting use" – similar to the EU AI Act's "high risk" uses. There are also a number of state laws and state executive orders regulating the government.

Apprentice: OK, that's different since the government is not subject to many of the existing laws that we discussed, and definitely not the U.S. State privacy laws.

Expert: That's right, but it doesn't end there. Another family of bills address specific aspects of using AI like AI transparency – requiring that the algorithm be explainable and not in a "black box." Others require "watermarking" to see when something has been generated by AI. And yet others prohibit deepfakes. There are even other bills that address the use of AI specifically in the workplace.

Apprentice: So are we coming full circle? Are we approaching a comprehensive AI law that would regulate AI as such?

Expert: Well, a recent bill from the Commonwealth of Virginia purports to regulate actions by "developers of high risk AI systems" and "developers of generative AI," as well as "deployers" before they use high risk AI systems for consequential decisions."

Apprentice: Wait a minute… where did we see those terms before? Law of the Horse indeed. ■

ABOUT THE AUTHOR:

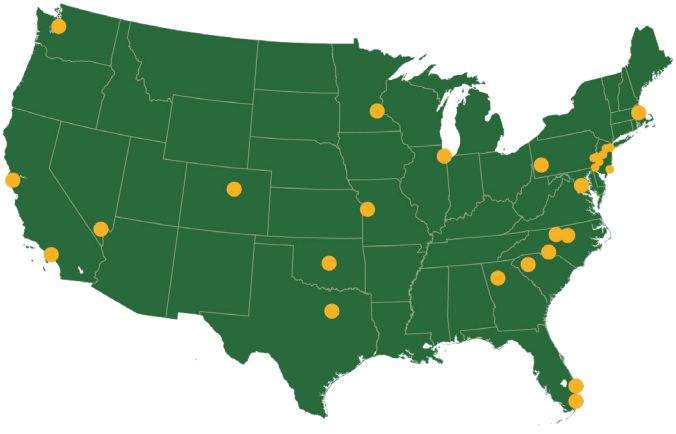
Odia Kagan is a Partner and leads data protection compliance at Fox Rothschild LLP, a U.S. national law firm. Odia advises companies of varying industries and sizes on compliance with data related regulation including: AI and biometrics regulation, GDPR, the California Consumer Privacy Act (CCPA) and other U.S. data protection laws. With an emphasis on assessing future trends and a pragmatic, risk based approach, Odia provides clients with practical advice on how to design and implement their products and services in a compliant manner. Odia holds 3 law degrees, 5 bar admissions and 7 privacy certifications (CIPP/US/E, CIPM, CDPO, C-GDPR/P, FIP, PLS). You can follow her on https://www.linkedin.com/in/odiakagan/ or X at @odiakagan.

[16] *https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf*

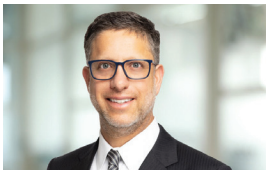
[17] *https://docs.google.com/document/d/1vKTiubShiLgcWLqQpKaXsGwMfoiJlP5wdMV5tIPU8ak/edit*

YOUR GATEWAY TO THE US

We provide innovative legal services that help growing Israeli companies convert on business opportunities and reach their goals.



Our Israel Group is one of the largest among US firms, consisting of more than 30 attorneys — including fluent Hebrew speakers who understand the nuances of Israeli culture — based in major US business hubs. We're well-positioned to assist Israel-based clients with a full range of local and international issues, including labor and employment, privacy and data security, intellectual property, arbitration, immigration and corporate law.



Michael A. Sweet
+1 415.364.5560
msweet@foxrothschild.com

Sarah B. Biser
+1 862.576.1354
sbiser@foxrothschild.com

Odia Kagan
+1 215.444.7313
okagan@foxrothschild.com