Concept Note

From Data Protection to Data Justice – redressing the uneven distribution of opportunities and harms in AI*

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As artificial intelligence and machine learning (AI/ML) move towards becoming general purpose technologies increasingly traversing every area of life, ensuring that their deployment does not perpetuate historical injustices and structural inequalities is a public policy priority (see Birhane 2020). Without rights-preserving frameworks for the governance of data as the key input in such advanced technologies and the governance of the algorithms used to analyse and process the data, the uneven distribution of opportunities - and benefits, harms and risks - already evident with AI and ML deployment, will intensify.

Problem statement

The response of global epistemic communities to this acknowledged wicked policy problem, has been to promote the adoption of dominant normative frameworks for data governance developed in the global North, largely led by the European Union. These normative frames are based on assumptions of democratic and rights frameworks in context of the rule of law; institutional endowments to implement and govern effectively; and levels of human development that allow citizens to exercise their rights and freedoms, that do not pertain in many jurisdictions. Not only are such approaches sometimes insufficient to create the conditions for the much-vaunted "AI for Good agenda", but they also fail to account or prepare for the reality of contextual developmental demands.

Such data governance frameworks tend to focus narrowly on data protection which is equated with privacy - specifically privacy with individualised rights and risks and therefore protections (Razzano 2021). With the global crisis precipitated by COVID-19, the growing dominance and linkages of data, big data analytics, the Internet of Things and algorithms have placed data as a key resource in public health management and economic reconstruction. This has highlighted the need for data also to be regulated in the collective interest or for common good.
Collective interest also pertains to the governance of data in the context of identifiable groups or communities where the potential consequence of individual identification results in the exposure of collective identity (Solove, 2020; Tisne, 2020; Tufekci, 2018 in Razzano 2021).

The concept of data justice emerging in the literature promotes a broader view than data protection. Taylor (2017) contends that the notion of justice is needed in order to establish the rule of law. From this she posits that data justice can be understood as "fairness in the way people are made visible, represented and treated as a result of their production of digital data". In the context of AI, the significance of this is not only the protection of data subjects or producers from data holders or users, but the injustices resulting from automated decision-making that impact negatively upon them as a result of the poor quality of data on which algorithms are dependent for generating information or decisions. She proposes three pillars as the basis of a notion of international data justice relevant to the development of rights-based AI: (in)visibility [or representation]; (dis)engagement with technology; and (anti) discrimination

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Yet, much of the literature, advocacy and practice of data governance continues to be viewed and undertaken from a negative regulatory perspective. That is to say, it has sought to prevent harms in relation to rights violations and mitigate associated risks through compliance and prevention - particularly data protection (privacy) and cybersecurity, but also in relation to limitations on freedom of expression. This approach is based on the traditional negative duties of governments with respect to individual rights like privacy and freedom of expression, where the government must protect the individual from interference with the enjoyment of a right, rather than take positive steps to ensure access to a right .

Approach

This paper contends, however, that these are only necessary, and not sufficient, conditions. Positive regulation is needed to redress inequality and injustice. Protection of fundamental rights, particularly privacy as has been the case, is important but second and third generation social and economic rights also need expression in policy as they impact on the equitable opportunities in relation to data governance and AI and enabling people to exercise the rights.

Acknowledging the uneven impact of harms on vulnerable people and communities must, from a public interest perspective, for example, require differential risk mitigation. Conceptually this is already present in the digital rights work that draws on development literature inspired by Amartya Sen's notion of 'capabilities as freedoms', and which has focused on the need for positive interventions to enable people to exercise their rights (Nussbaum 1992, Sen 1993 and 1999.)

So, while the literature and practice of data governance has predominantly been viewed and undertaken from a negative regulatory perspective focusing on first generation rights, there are many areas of data governance that require positive regulation to realise second and third generation social and economic rights such as data availability, accessibility, usability, integrity, as well as concerns about ownership, impacts on trade and competition (OECD 2019) for equality and justice. There are also issues of intellectual property and ownership that impact on fair trade, competition and consumer rights (OECD 2019).

A similar approach to understanding the structural challenges embedded within data-related harms and the differential levels of readiness and capacity governments in Africa have to address these harms, which is being adopted in the [Global Index on Responsible AI project](). This RIA project is incorporating the notion of the progressive realisation of socio-economic rights, subject to a country's maximum available resources, as a key framework for assessing the extent to which countries around the world are ensuring AI does not harm human rights within a more fair and equitable framing. The doctrine of the progressive realisation of socio-economic rights subject to maximum available resources, as set out by the UN Committee on Cultural, Economic and Social Rights, applies where governments are required to take positive steps to advance the realisation of rights, which have resource and budgetary implications. In such contexts, governments must take all relevant steps within their available resources – which includes state resources, private sector resources and international development assistance – to progressively realise human rights.

In relation to the structural concerns underlying data justice, some of the reasons for this lack of attention to economic regulation relate to the heterogeneity of data and the complexity of the governance of different kinds of data. But, through a political economy lens as Singh and Gurumurthy (2021:1) argue "…the lack of economic governance of data has at least as much to do with whose perspectives and interests dominate the data governance narrative. Keeping

economic governance of data related discussions away from the policy table most suits those who currently partake of all the value of data collected from across the world, i.e., a few global digital corporations. It also serves the governments of those countries where almost all such corporations are based, the US, and now increasingly some in China." Not governing the economics perpetuates the status quo and opening up data market or data flows without enabling the fair and equitable participation of individuals, communities and countries disadvantage mostly countries in the global South "…and groups that are fast losing out in the emerging global digital economy equations, value chains and hierarchies…"

Synthesis of purpose, scope and approach

Building on this literature, this study will explore the complementary positive policy and regulatory interventions that are necessary to rectify the uneven distribution of opportunities and harms associated with deployment of AI/ML, data and algorithmic governance, and the institutional arrangements required to mitigate differential risks. It will seek to identify the practical points of policy intervention and regulation required to redress inequities and injustices to enable people to exercise their rights as data subjects and as the recipients of automated decision-making in developing country contexts. Recognising the global nature of the data economy, it will also examine the forms of economic regulation required both in terms of global governance and economic regulation that will enable more equitable outcomes between and within countries in relation to AI deployment, and ensure that this is done in ways that prevent the kind of involuntary incorporation of developing countries into international trade and security regimes that has characterised these types of treatise and agreements in the past.

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