BEYOND THE GDPR?

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Beyond the GDPR?

- Like the FTC: destroy not only the data but everything built on it
- For me, the only problem with the GDPR is its enforcement
- And, compliance (because that often introduces compliance software ...)
Beyond the GDPR

- Is the GDPR enough? Does it solve the problem of AI causing havoc?

- No, we are in the era of ‘never enough data’

- Ever more applications are built with data-driven AI: health, safety and FR
Beyond the GDPR

- So now we have the upcoming EU data law framework
- Why does the GDPR matter? First bullwork against the growing data hunger
- Data minimisation & purpose limitation may prevent some of the havoc
Beyond the GDPR

- Havoc caused by a remarkable belief in the meaning-driven nature of text-data
- LLMs believed to be trained ‘on the entire internet’ and thus ‘on the entire world’
- In that light I would propose that all data is syntactical, because intra-linguistic
Beyond the GDPR

- Syntactic refers to the relationships between signs: intra-linguistic reference

- Semantic refers to both the intra-linguistic and the extra-linguistic reference

- LLMs cannot ever ‘get’ anything but intra-linguistic reference (next word token guessing)
Beyond the GDPR

In that sense the problem of data-driven AI is that all harms will be driven by meaning-agnostic data and models.
Some references

■ On information, performative effect and the law:

■ On regulatory theory and law:

■ On data-driven research:
Some references

■ On the ML pipeline and the political economy of recommender systems:

■ On the Rule of Law:
Some references

■ On information, performative effect and the law:

■ On regulatory theory and law:

■ On data-driven research:
FUNDAMENTAL ISSUES WITH THE HARMS-BASED APPROACH
The harms approach

■ In law:
  - tort law
  - to claim damages
  - identifiable individual harm caused by wrongful behaviour of the tortfeasor

■ In quantitative policy science and in utilitarian political philosophy:
  - positive freedom is limited by the harm principle
  - the state should not interfere unless this is warranted by potential harm

■ Key question:
  - Can we measure potential future harm?
  - Can we avoid potential future harm by taking evidence-based measures?
The harms approach

- The utilitarian assumptions of the harms-based approach
  - John Stuart Mill:
    - liberalism and rule utilitarianism
    - the harm principle

- Anglo-American common sense is marinated in utilitarianism
  - Harms-based approach as a panacea (naïve)
  - CBA as a panacea (naïve)
The harms approach

- Regulatory theory is directly linked with utilitarianism
- "legal regulatory theory, legal regulation should target phenomena that
  - cause the problems that regulation aims to solve or
  - the phenomena that are instrumental for the desired regulatory outcomes"

[difference between instrumentality and instrumentalism]
The harms approach

- Legal theory is not equivalent with regulatory theory, it is *both more and less*
  - Legal norms are directly related to *legal certainty, instrumentality and justice*
-Acknowledging the antinomian relation between them (Radbruch)
- While rejecting a final ranking (Radbruch)
- See also Waldron, Dworkin, Toope, Sen, Sandel, Brownsword
The harms approach

- Regulatory theory prioritises the instrumentality of legal norms
  - Thereby ‘reading’ them as only means to policy ends
  - This easily results in weighing means in terms of their efficiency
The harms approach

- Economists have ‘discovered’ the Goodhart effect, elegantly worded by Strathern:
  - ‘if you use a measure as a target, it ceases to be a good measure’
  - check complexity theory about predicting complex systems
  - human society is a complex system, if anything

- Law is defined by its performative effect (= legal effect)
  - This is not causal or logical but constitutive of our institutional reality

- Legal effect is far more effective in the long run
  - It is related to Hart’s ‘internal aspect’ of legal norms
Tort law

Fundamental Right

- Tort law = private law
  - Aims for the compensation of harm caused by wrongdoing
  - Need to identify individual harm
  - At societal level that would be an aggregate (collective action)

- Fundamental rights law = constitutional law
  - Aims to counter violation, for which harm is NOT a condition
  - Violation of rights whose substance is not computable
  - Violation of norms, whether that violation results in identifiable harm, or not
  - The consequences of norm violation are potential anomia, not harm caused
EU data law

- Replacing a legal approach with one of policy science is not a good idea:
  - It will invite social engineering
    - Nudging (behavioural economics, combined with machine learning)
    - Game theoretical manipulation (rational choice theory, combined with MAS)
    - Psychometrics (combined with sentiment analysis and the above)
- The legal approach is not only more effective in the long run
  - It also takes human agency seriously in a way that causal influencing cannot
    - Regulatory theory is a cynical approach to human agency
  - The legality principle supports a qualitative, normative understanding of effectiveness
The AI Act aims to protect health, safety and fundamental rights
- It hopes to prevent risks to health, safety and fundamental rights

It takes a risk approach which is not the same as a harm approach
- A risk to a right is not a risk of harm but a risk of violation
- A health risk is a risk of trauma or disease
- A safety risk is a risk of physical injury or death

The risk approach in relation to fundamental rights is a precautionary approach

The AI Liability Act takes a harm approach as it concerns tort law
Meaning-driven law
Meaning-agnostic regulation

- Meaning-agnostic systems:
  - Symbolic computing systems (knowledge-based, logic processing, rules as code)
  - Sub-symbolic computing (ML, DL, NLP, GPT)

- In the context of a computing system all data is meaning-agnostic
  - Symbolic computing systems operate on the syntactic relations
    - Ontology, semantic web (intra-linguistic references)
    - Logical operators define syntactic relations

- Meaning is created on the cusp of intra- and extra-linguistic reference
  - this is not in the remit of digital computers
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Meaning-driven law
Meaning-agnostic regulation

- **Meaning-agnostic influencing (regulation):**
  - perlocutionary instead of performative effects
  - nudging ‘humans as puppets’ instead of addressing ‘humans as agents’

- **Meaning-driven interaction (legislation, case law, doctrine, fundamental principles, custom):**
  - Governing through written and unwritten legal speech acts
  - Taking human agency seriously
  - Also in the sense of not trying to see legislation as regulation-only
The Fundamental Issues with the Harms-Based Approach

[Cartoon: An old man holding a sign saying "THE END IS NEAR," and a young person holding a sign saying "ACTUALLY, THIS IS JUST THE BEGINNING." ]