Automated decision-making and Digital Constitutionalism: Understanding the GDPR

Edoardo Celeste
DCU School of Law and Government
@EdoCeles
Humans and Machines

- AI has increasingly subjected individuals to decisions taken by automated systems
- Apex of an ample parabola
- Machines have relentlessly eroded judgment
Humans and Machines

• **Protagoras**: “Of all things the measure is man”

• **Machines** have progressively replaced human beings in their capability to **measure** time, temperature and distance

• **Koyre** > from an **approximate** and indefinite world to a **precise** and measurable universe
Humans and Machines

- Tiny part of human judgment has never been surrendered to machines: important legal decisions
- AI is challenging this last bastion of humanity
- Data protection law plays an important role to avoid that individuals are left at the mercy of automated systems and their developers
Humans and Machines

Why?

- Art 22(1) GDPR: “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"
Outline

1. The Path towards the Regulation of Automated Decision-making
2. The Constitutional Message of the GDPR
From the *Loi Informatique et Libertés* to the GDPR

Data Protection Directive’s provision on automated decision-making (Art 15) does not derive from Convention 108 / OECD Guidelines

→ Convention 108 Explanatory Report mentions related issues
From the *Loi Informatique et Libertés* to the GDPR

No national data protection legislation – but one – included any principles on automated decision-making prior to the adoption of the Directive.

→ French *Loi Informatique et Libertés*
1974

- **Cousté** proposes a **Commission** on computing and private life

1976

- **Chirac** government presents a **bill** on computing and freedoms
  - **Art 2**: No **judicial** or **administrative** decision shall be **solely** based on automated data processing
  - **Art 3**: Right to **know** and **contest** the **logic** employed in automated data processing **negatively** affecting him/her
1977

- Law Committee Report > amendments to the bill

1978

- Art. 2(1) > No judicial decisions solely based on automated data processing
- Art 2(2) > No administrative decisions solely based on automated data processing

LOI n° 78-17 du 6 janvier 1978
relative à l'informatique, aux fichiers et aux libertés (1).

L'Assemblée nationale et le Sénat ont adopté.
Le Président de la République promulgue la loi dont la teneur suit:

CHAPITRE Ier
• **Data Protection Directive**
  • Art 15 > mix of 2 versions of French bill
    the right [of] every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects [...] 

• Notwithstanding the entry into force of the GDPR > art 47 loi informatique et libertés maintains specific regime for legal decisions
GDPR and Digital Constitutionalism

• **French** law > fear of judge/administration-machine

• **Why** Art 22 GDPR?

• Art 22 does **not** directly protect **personal data**, but a series of **values** that automated decision making put under threat

• **constitutional** values

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GDPR and Digital Constitutionalism

- GDPR plays a para-constitutional role
- Translates values of contemporary constitutionalism in operational norms
- Direct expression of digital constitutionalism

https://www.google.ie/imgres?imgurl=https%3A%2F%2Fupload.wikimedia.org
GDPR and Digital Constitutionalism

• Art 1 GDPR > protection of personal data + fundamental rights and freedoms
• Provisions on automated decision-making as example of this broader function
• Scholarly debate on automated decision-making >> investigation of underlying constitutional values

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1. Human Dignity

Art 22(1) > general prohibition of all decisions which:

a) are **exclusively** based on a form of automated processing of personal data, and

b) generate **legal**, or at least, **significant effects** on the data subject.
1. Human Dignity

- Art 22(1) operates a **balancing**
- **No outright ban**, but prohibition of cases with serious impactful effects on human life
- **Higher risks** are at stake > **machines do not suffice**
1. Human Dignity

- Machines are more efficient than human beings
- Machines can err and perseverate in erring
- Algorithms are value-laden and can be discriminatory

1. Human Dignity

- Human being as *apax legomena* (Floridi); uneven, irregular and *multiform* movement (Montaigne); *polytropos* (Homer)
- **Unpredictability** of human being needs to be respected > human being is *dignus* = worth it
- **Reducing** human life to machine readable content *violates* human dignity
1. Human Dignity

- Human being cannot be **reduced** to digits again
- GDPR reflects the **right to escape from blind determinism** of machines ultimately at the service of **private and public dominant actors**
- In this way, we **preserve the dignity** of a less schematised, diverse and irrational **humanity**
1. Human Dignity

- Art 22 > translates human dignity in the context of algorithmic society
- Today human dignity also means not being sacrificed on the altar of economic efficiency
- Digital humanism

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2. Balancing of Powers

- Art 22(2) = exceptions to general prohibition
- Is it a **contradiction**? Can we therefore tolerate **dehumanisation**?
- **Safeguards** allow for re-humanisation of decisions
2. Balancing of Powers

- Art 13-15 = right to be informed about existence, logic, significance and consequences of automated decision-making
- free development of one’s own personality + transparency
- balancing of powers

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2. Balancing of Powers

- rebalancing of power asymmetry
- translation of rule of law in the algorithmic society
- both private and public actors as dominant players

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3. Due Process

• Article 22(3) provides the right of the data subject to require human intervention, to express her point of view and to contest the decision > due process + human dignity

• the judge of our actions must be human at least at the end of the process

• we will never be able to design a machine that understands fully our inefficiency and irrationality
Digital Humanism

- AI increases level of efficiency
- troubling opacity of algocracy
- GDPR as a response to threats of techno-authoritarianism
- GDPR expresses a new form of humanism
- digital humanism = vision where data subject’s free development, personal identity, and life outrank technology and economic efficiency
Digital Humanism

- **Humanity** is an invention which has yet **not** been **fully** explored
- **Only** other **human beings** should take the responsibility to judge it and affect its course of action
Thank you for your attention!

DCU Ethics and Privacy Week

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