The Rule of Law: for everyone in a world with AI

Decisions made by every public body must satisfy the Principles of the Rule of Law as identified by Lord Bingham.[1] These principles have been tested, internationalised, and localised to jurisdictions and cultures around the world. They are universal, robust, and can be applied to any decision-making framework. They also apply to uses of technology such as 'data processing'.

The Data Protection Bill introduces the "Framework for Data Processing by Government"[2] – a framework for which there is no published draft, the effects of which are incredibly broad and powerful, and completely opaque. As defined in the Bill, the framework covers *any* data in *any* public body, including the SIAs, that is processed in *any* way, including AI.

Data processing at scale risks systemic failure with broad and lasting impact. For example, families with a disabled child missed out on up to £84 per week, *for years,* because of errors in data processing by Government.[3] When the problem was finally addressed in 2016, some families may have lost over £20,000 of entitlements because payments were backdated for less than the five year period during which the Government's errors had underpaid these families. These errors arose from a basic failure of the Department for Work and Pensions and HMRC to process data correctly – neither department having any incentive to detect this. Most data processing errors are more common and more individualised, derived from something as basic as a spelling mistake in someone's name,[4] or misreading someone's date of birth on a form.[5]

A small data processing mistake by Government can have catastrophic implications for a citizen. To avoid the arbitrary exercise of power, entitlements and obligations of individuals must be able to be understood – i.e. decisions must be explained, and explainable. The same must apply to data processing.

If a different, lower, standard of 'ethics' is created to apply when AI is involved, then this would erode the Rule of Law on which our society is based. It would be a choice made simply because it is easier, and more convenient for some. Is it really expected that we should create a lower standard because someone wishes to use a tool such as AI but doesn't want to do the work to understand the decision-making process?[6]

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[1] Bingham: The Rule of Law https://www.penguin.co.uk/books/56375/the-rule-of-law/
[2] Clauses 185-188 of the Data Protection Bill
[3] https://www.theguardian.com/uk-news/2016/nov/25/tax-credit-error-costs-families-with-disabled-children-4400-a-year
[4] https://www.theguardian.com/uk-news/2017/sep/26/leave-uk-immediately-scientist-is-latest-victim-of-home-office-blunder
[5] https://www.independent.co.uk/news/uk/home-news/nhs-letter-newborn-baby-eight-day-old-identity-documents-free-healthcare-right-violet-nik-horne-a7955211.html
[6]https://medconfidential.org/2017/on-what-principles-will-data-be-used-in-the-single-government-department

Tools that process data[7] to inform decisions by public bodies must meet the standard we have set for ourselves as a democracy: the Rule of Law.

We have encouraged the Rule of Law around the world as an independent and high standard. Rights and liability should be determined by application of a known process, and not the exercise of discretion. As the Bingham Centre has explained:[8]

> "The rule of law can be understood in contrast with the 'rule of man', meaning a society in which one or more individuals rules arbitrarily exercising power unconstrained by law where the ruler(s) are above the law."

The principles identified by Lord Bingham, and the checklist from the Venice Commission,[9] provide a basis for a clear and impartial informed debate on the uses of data processing. Precisely the debate that the 'Framework for Data Processing by Government' has at every stage sought to evade. The existing non-statutory 'Data Science Ethics Framework' - also owned by DCMS - suggests you can deal with all privacy and propriety questions in a single side of A4.[10]

In an increasingly digital world, public confidence in Government requires Government to handle data in a transparent way in accordance with the Rule of Law. That requires not only transparency to citizens on how data about them has been used, but an understanding in public bodies that the principles of the Rule of Law apply to decisions around data processing equally as with all other decisions.

The Framework for Data Processing by Government should be amended at Report to require a published statement explaining compliance of all data processing with the principles of the Rule of Law. That statement can provide an evidence base for those subject to data processing errors.

Private entities

Public law requires a clear legal basis for all acts of public bodies. Private bodies are treated very differently, with regulations constraining certain acts.

AI development tools are broadly application-agnostic and often freely available, and because every AI used by public bodies must be explained to the satisfaction of the Principles, those same tools can be reused by any entity who wishes to show their AIs meet the highest standards of data processing. There is no compulsion, but there can be an expectation.

As an example, facebook claims it wishes to act ethically and in its users' interests, but the customers of Cambridge Analytica have made clear this is not quite as true as facebook chose to believe. There should not be an arbitrary standard of ethics applied to data processing; after all, no tyrant has ever failed to justify their actions.

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[7] AI is simply data processing. http://data.parliament.uk/writtenevidence/committeeevidence.svc /evidencedocument/artificial- intelligence-committee/artificial-intelligence/written/69500.html
[8] pg 11 https://www.biicl.org/documents/1284_briefing_paper_-_parl_and_rol_in_brexit.pdf
[9] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e
[10] https://medconfidential.org/2016/data-in-the-rest-of-government-the-cabinet-office-data-programme/