

Data Protection and Artificial Intelligence Inequalities and Regulations in Latin America

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This special issue is the result of the 2022 Call for Papers on Artificial Intelligence (AI) and Data Protection in Latin America, organised by CPDP LatAm³, a multistakeholder platform discussing privacy, data protection and technology, combining the Latin American editions of the Computers, Privacy and Data Protection (CPDP) conference, the MyData conference, and Privacy Law Scholars Conference (PLSC).

The choice of exploring some of the key aspects and instances of AI applications in the region and their intersection with data governance regimes has become a necessity, considering the enormous proliferation of AI in the region. Indeed, while Latin America is well known for its staggering economic inequalities, it is important to stress and understand that the ongoing digitalisation and adoption of AI systems, which were turbocharged by the recent pandemic, reveals the establishment of a new type of technological and data inequality.

On the one hand, the evident explosion of trainings, publications, and events dedicated to the issues in most Latin American countries provides concrete evidence that the wealthiest and most educated minority is eager to learn about the use and functioning of AI systems, as well as the regulation – and limitations – of the national data protection regimes. On the other hand, the enormous majority of Latin Americans is becoming unconscious and unmindful user of a plethora of AI systems, without having any clue of the set of data protection rights that the frequently recent or brand-new data protection laws ascribe to every individual.

AI is already largely deployed in the region, not only by large digital platforms but also to digitise a variety of public services and cater for public goods. The use of facial recognition to provide security or the automation of data processing by tax administrations is extraordinarily common.

Importantly, AI systems are already embedded in the decision-making processes of various sectors. Fields as diverse as electronic commerce, credit scoring, financial services, public transportation, health, education, employment, public safety, and law enforcement already largely utilise AI to improve efficiencies. This automatization and digitalisation present opportunities for economic, social, and environmental gains, but it poses also relevant risks that need to be carefully considered.

The mounting adoption of AI has an impact not only on the structure of Latin American economies and societies, but on the full enjoyment of people fundamental rights and on the functioning of democracies. Critically, these evolutions are appreciated by remarkably limited minority and their implications are fully understood by and even limited group of specialists and entities. It is much more common to hear expressions

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of enthusiasm about the “arrival” of AI and jubilations regarding the great advancements brought by the Fourth Industrial Revolutions, rather than serious discussions about also the social costs of such trends, notably with regard the informational self determination of every Latin American.

Technological evolution and AI adoption are essentially inescapable due to the enormous market incentive. Recently, former Chilean president and UN High Commissioner for Human Rights, Michelle Bachelet has issued a statement proposing a moratorium on the commercialisation and use of AI systems that pose human rights risks, such as the deployment of AI for facial recognition, until the necessary safeguards are implemented. This type of initiative reveals the existence of an increasingly widespread suspicion towards certain types of increasingly popular AI systems, such as face recognition technologies.

Importantly, Latin American societies need to face the challenges brought by AI in the most well informed and constructive manner, rather than simply engaging in a falsely Manichean choice of adoption versus rejection. This is, by itself, an enormous challenge as the issue at stake is characterised by considerable complexity and by far not the most pressing issue for Latin American policymakers.

It is important for civil society, business communities, technology developers and public administrations to be involved into the elaboration and implementation of the new regulatory frameworks that Latin American countries are going to shape. The quality of such frameworks is directly impacted by the quality of the multistakeholder governance underpinning such frameworks.

Moreover, the full involvement of the various sectors of society is not only beneficial to enhance the quality of regulation but is also instrumental to the mitigation and, ideally, the eradication of the data and technological inequalities that are already shaping Latin America. The shared goal should not be to disincentivise or curb innovation with regulation, but to promote awareness of the risks involved in the use of AI and offer actionable tools and strategies that individuals, communities, administrations, and corporations can use to mitigate risks and uphold rights.

Regulatory strategies

This special issue provides us with a brief yet interesting overview of the tools that data protection laws already offer to frame our discussions on AI governance and the shortcomings and challenges that must be tackled by legislators, regulators, researchers, and society at large.

Clearly, technological innovation and human rights protection need to work in tandem. However, it is renown that regulating emerging technologies poses several challenges, most notably the difficult balance between stimulating permissionless innovation and guaranteeing the full enjoyment of rights and the full implementation of security measures, while fostering the most ethical environment.

Several strategies may help us embracing the challenges that AI poses to regulation, including the experimentation of regulatory sandboxes, which allow to test new technology and proposed strategies in controlled scenarios. Another option is experimental governance, a technique pioneered by China, which has been experimented by some Latin American countries, organising prototypes of public policies, meant to foster multistakeholder collaboration to understand the impact and performance of new regulation in each area.

To understand the complexity and untangle the various dimensions and connections of Artificial Intelligence (AI) governance and data protection in Latin America, it is essential to adopt a multistakeholder and a multidisciplinary approach, but also to make the best possible use of the existing regulatory achievements. In

this respect, data protection laws and institutions, already established by fourteen countries in the region, offer precious guidance and support to mitigate the numerous risks related to AI applications.

AI systems are based on the processing of enormous quantity of information that frequently includes personal data. In this perspective data protection is essential to guide the sustainable deployment of AI, prevent potential misuse or sanction existing abuses. Sound and correctly enforced data governance is therefore key to bridge the already deep data and technology inequalities and avoid that they deepen even further.

All Latin American data protection systems provide some fundamental principles, upon which AI governance must be built, such as transparency, legality, consent, necessity and good faith, security, and social participation. As of 2022, sixteen Latin American countries provided constitutional status to data protection, thus stressing the utmost social importance of this issue.

While AI regulatory framework are still in an early phase of conception in Latin America, the region has a remarkably rich AI ecosystem, supported by a creative and young population. In this perspective, a vital consideration for any regulatory solution to be adopted is to make sure that norms can be understood and correctly implemented by developers.

The recent experiences with the establishment of new data protection frameworks in the region provides useful teachings in this regard. Indeed, it has become overly evident that even when regulation is solid and a dedicated regulatory authority exist, implementation might be very poor, either because of lack of regulatory specifications or due to very limited resources of the regulator or both. Such scenario is detrimental as any good faith entity deploying AI solutions that affect personal data lacks guidance to act ethically and in observance of the law, while any bad faith actor knows that lack of compliance will go unnoticed or unsanctioned.

Unfortunately, a general trend that we can observe is that the region is not sufficiently equipped to frame AI, from a regulatory perspective. Even the countries that might be seem formally prepared, such as those which already have data protection frameworks and AI strategies, do not implement such document in consistent ways and lack resources and capacities on the side of the regulators. Furthermore, the very large spectrum and diversity of conceptions of AI systems and their governance does not allow to have a structured and homogeneous approach at the regional level and, frequently, is also reflected in fragmented national policymaking.

It is also important to stress that it might be enormously difficult to regulate the evolution of AI and make it consistent with data protection frameworks, if the only vector of regulation is a poorly designed and poorly implemented regulatory framework. In this perspective, it is essential to understand that to regulate effectively, particularly when the item to be regulated is so complex, policymakers must carefully blend norms, investments, and technical standards. Norms are necessary to define the principles, rights, obligations, and enforcement tools that will guide the evolution of AI and the governance of personal data.

However, investments are also critical to foster the development of technologies and the adoption of approaches that bake the desired normative framework into products, services, and organisational structures. To facilitate this process, technical standards must also be envisaged so that the translation of the normative into the technical becomes clearer, thus allowing the legal precepts to reach the developers and not only the lawyer.

Sadly, the confused and sometimes schizophrenic regulatory approaches to AI and data governance that we might witness in the region are also typically matched with sever lack of investments and technical guidance.

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This is one of the main and most complicated obstacles to be overcome in the years to come, as the contributions to this special issue demonstrate.

First, UN Special Rapporteur on the Right to Privacy Ana Brian reminds us in the foreword about the importance of multistakeholder debates and the role that CPDP has played in this regard, from its inception in Europe to the materialization of the first Latin American conference in 2022, after a first version was held online in 2021 due to the COVID pandemic. Her contribution reviews some of the key topics discussed throughout the conference, highlighting the wide range of perspectives that were brought to the conference.

This contribution is followed by a preface written by the Director of the Brazilian data protection authority, Miriam Wimmer, offering important reflections on the need to carefully consider a number of elements when regulating artificial intelligence: above all, both the economic perspective and the human values (including fundamental rights) that are at stake. She reminds that Latin American countries face structural challenges relating to the development of Artificial Intelligence, which may place them at disadvantage in the “global race to AI”. At the same time, the history of colonialism, authoritarianism, and social inequalities in the region, combined with political uncertainty, may call for a somewhat different approach to some of the key concepts of AI and regulation than other countries would suggest.

The Special Issue includes five selected articles, which corroborate and exemplify these discussions with concrete case-studies. We do not provide an overview of these articles here, which can be found in Ana Brian’s foreword. Suffices to say that a common thread among the contributions to this Special Issue is the recognition of the risk of discrimination and objectification intrinsic in artificial intelligence, the strong asymmetry of power between individuals using AI systems and corporations or public entities deploying them, and of the powerful role that data protection regimes play in addressing those concerns.

Importantly, while the idea of regulating AI is much in vogue these days, this trend should not be blindly followed without appropriate consideration of incremental changes that make our existing framework more effective. Since data protection law has been conceived to deal with some of the very same concerns that are raised with AI governance today, governments around the world should not underestimate the benefits of investing resources and enhancing institutional arrangements that can facilitate effective governance, regulation, and enforcement.